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IN THE

Supreme Court of the United States

October Term, 1992

LORAIN BOARD OF EDUCATION,
and
LORAIN NAACP,
and
COALITION FOR HISPANIC ISSUES AND PROGRESS,
Petitioners,

vs.

OHIO DEPARTMENT OF EDUCATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court lacks the power to modify an institutional reform consent decree because there has been no adjudication of the merits of the case or specific findings or admissions of constitutional violation by the defendants?

2. Whether a district court has the authority to require additional financial obligations from a governmental defendant when the court modifies an institutional reform consent decree based on evidence of "changed circumstances," including the discovery of a government defendant's financial miscalculations?

3. Whether a governmental defendant in an institutional reform consent decree, where there is no adjudication of the issues or specific findings or admissions of constitutional violation, can avoid an obligation required by a modification of the consent decree even though this avoidance imposes an unforeseen and inequitable obligation on another governmental defendant who may consequently breach the consent decree?

4. Whether, without finding them clearly erroneous, a court of appeals can disregard the district court's findings of fact, including findings which resolve ambiguity in a consent decree, and thereby substitute its conclusions for those of the district court in order to change the result reached by the district court?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on November 12, 1992. Petitioners' motion for rehearing and suggestion for rehearing *en banc* was denied on January 5, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 979 F.2d 1141 and is reprinted in the Appendix hereto, p. A1, *infra*. The opinion of the United States District Court for the Northern District of Ohio which was favorable to Petitioners is reported at 768 F. Supp. 1224 and is reprinted in the Appendix hereto, p. A24. The order of the Court of Appeals for the Sixth Circuit denying Petitioners' motion for rehearing and suggestion for rehearing *en banc* is not reported and is reprinted in the Appendix hereto, p. A93.

JURISDICTION

The jurisdiction of the United States District Court for the Northern District of Ohio in the underlying case is based on federal question jurisdiction pursuant to 28 U.S.C. §1331.

On June 21, 1991, the district court entered a memorandum opinion granting the relief sought by Petitioners. 768 F. Supp. 1224. Following Respondent's appeal of that opinion and judgment entry, the Sixth Circuit entered a judgment and opinion on November 12, 1992, reversing and remanding the opinion of the district court. 979 F.2d 1141. On January 5, 1993, the Sixth Circuit denied Petitioners' motion for rehearing and suggestion for rehearing *en banc*. Appendix, p. A93.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, United States Constitution: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. The Nature of the Issues Presented By This Petition.

This petition presents important issues of federal constitutional law and inherent judicial powers, which the Sixth Circuit decided in direct conflict with decisions and principles announced by this Court. In reversing the district court order, the appellate decision below even conflicts with other recent decisions of the Sixth Circuit itself. The issues raised in this school desegregation case present the opportunity for the Court to develop and clarify the law with regard to the modification of institutional reform consent decrees. This case also presents the occasion for the Court to exercise its supervisory power and instruct the lower courts on the appropriate division of functions between district courts and courts of appeals.

The appellate panel below promulgated a new rule of law, without precedent in any federal court, which virtually eliminates a district court's well-established equitable power to modify an institutional reform consent decree. If allowed to stand, this new rule will deter civil rights litigants from entering into consent decrees and force those bound by such decrees to undertake litigation to establish liability years after that liability was ripe for adjudication.

In its review, the Sixth Circuit did not contest the district court's findings of fact, nor did it find that the district court applied the wrong legal standard for modification of an institutional reform consent decree. Yet it changed the result reached by the district court. The court of appeals should not fashion its own rule in order to achieve the outcome it favors. Appellate review

is strictly limited since appellate courts do not try cases. An appellate court can only reverse a modification decision if it specifically finds that the district court's findings of fact are clearly erroneous or that the district court committed legal error. The Sixth Circuit failed to follow these rules and review by this Court is required to instruct the court and correct its decision.

This school desegregation case was originally filed in the district court in 1979. Petitioners are the Lorain Board of Education ("Lorain Board"), the local school district which was an original defendant in the underlying case; the Lorain NAACP, an original plaintiff representing minority children and parents in the school district; and the Coalition for Hispanic Issues and Progress ("CHIP"), an intervenor plaintiff representing Hispanic children and parents in the school district.

In August 1984, the parties entered into a consent decree under the supervision and authority of the district court to correct alleged discrimination against Black and Hispanic students in the closing of certain schools, in the assignment of students, and the hiring of teachers and administrators. Record 76, Consent Decree, p. A77. Since then, the district court has actively monitored implementation of the desegregation plan and the consent decree goals.

Acting on a motion by the Lorain Board to modify the consent decree, the district court held extensive evidentiary hearings in April and May 1991. The requested modification concerned the adequacy of the Ohio Department of Education's[1] ("Ohio DOE") contribution toward the shared costs of desegregating

[1] The Ohio Department of Education, an original defendant in this case, is the Respondent.

the Lorain public schools as provided for in the Consent Decree. On June 21, 1991, the district court issued a Memorandum Opinion, modifying the decree in favor of Petitioners, 768 F. Supp. 1224, p. A24.

The district court applied the flexible standard articulated in *Heath v. DeCourcy*, 888 F.2d 1105 (6th Cir. 1989) which was subsequently approved of by this Court in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. ____, 112 S. Ct. 748 (1992). The district court found that "changed circumstances" warranted the modification order—a finding which was not challenged by the appellate panel.

Following an appeal by the Ohio DOE, a panel of the Sixth Circuit reversed the district court, ruling that a district court can not modify a consent decree to impose obligations on a defendant absent specific findings or admissions of constitutional violation or a full adjudication of the issues. 979 F.2d 1141, 1153, p. A22. The appellate panel did not assert that the district court's findings of fact about changed circumstances were clearly erroneous, nor did it find that the district court applied the wrong legal standard. Rather, the Sixth Circuit exceeded its limited review power, in order to impose its own result, by grafting a new and additional legal requirement for modification on the rule set by this Court in *Rufo, supra.*

By the decision below, the appellate panel has created a new *per se* rule that eviscerates the "flexible standard" for institutional reform consent decrees adopted by this Court. In reversing the district court, the Sixth Circuit ruled:

> We hold that a district court may not, in the name of modification, circumvent the express terms of a defendant party's consent in the absence of an

> adjudicated or admitted violation of law. In the absence of an adjudication or admission of constitutional violation, the district court's authority to impose additional obligations on a defendant is constrained by the terms of agreement entered by the parties to the consent decree.

979 F.2d at 1153, p. A22.

Because this case was settled—not litigated—and because there are no specific findings of constitutional violations or admissions by the defendants, the appellate panel determined that the district court has no authority to modify the consent decree.

The Sixth Circuit has imposed on the district court an even stricter standard for modification than the strict "grievous wrong" standard of *United States v. Swift & Co.*, 286 U.S. 106 (1932), applied to private party consent decrees. The new rule fashioned by the appellate panel below takes away from the district court both the jurisdiction and the power to modify institutional reform consent decrees in all but a few cases. It alters the basic rules established by this Court governing consent decrees.

The Sixth Circuit's rule places a new and virtually insurmountable burden on the parties, not contemplated by this Court or by any other Circuit. The district court is left powerless to enforce the correction of the constitutional violations unless liability is established or admitted. Thus, ironically, the Petitioners—particularly the Lorain Board—are in a *worse* position today than if they had litigated 10 years ago. With this new rule, the consent decree cannot be modified to enforce the decree, even if there are substantially changed circumstances requiring modification, solely because the parties entered into a consent decree rather than litigated the constitutional violations alleged in the Complaint.

The consequences of this new rule are grave. First, civil rights plaintiffs will be deterred from entering into a consent decree. The resulting increase in litigation will be costly in terms of time and money, for the parties, the public and the federal courts.

Next, because the Sixth Circuit's new rule *requires* an *adjudication* or an *admission of liability* before the district court can modify the consent decree, parties to existing consent decrees must now establish liability that was ripe 15 or 20 years ago. Evidence to prove liability will be stale. Witnesses may have forgotten vital facts or no longer be alive. Moreover, the Sixth Circuit is unclear as to whether the plaintiffs have to prove intentional discrimination today or at the time the lawsuit was first filed. Proof of intent will impose a nearly insurmountable and highly inequitable burden on the plaintiffs.

Finally, the Sixth Circuit's rule greatly limits the district court's equitable power to implement and modify institutional reform consent decrees. No liability has been admitted or established in many long-standing consent decrees. By imposing this new requirement, the Sixth Circuit decision contradicts this Court's rule that more flexibility is needed for district courts in such matters. The public's interest in ensuring a speedy, efficient, and effective dismantling of segregated institutions is severely diminished by this decision.

Consent decrees in a wide range of institutional reform cases are suddenly subject to the Sixth Circuit's retroactive requirement. The critical issue for this Court concerns the immediate impact of this decision in this Circuit, and the effect on consent decrees elsewhere if other Circuits start to respect this new decision. For these reasons alone, this Court should grant certiorari in this case.

II. The Consent Decree In This Case.

The Consent Decree, which was approved by the district court on August 13, 1984, sets forth the objectives of the parties to resolve the constitutional deficiencies in the Lorain public schools. The allegations raised by the plaintiffs are included in the decree:

> the defendants have engaged in a pattern of [sic] practice of discrimination against Blacks and Hispanics in the closing of certain school facilities, the assignments of students and the hiring and assignment of teachers and administrators.

Consent Decree, p. A77. Indeed, the parties agreed "to settle the claims made in the complaint by virtue of and in accordance with the terms and conditions of this Consent Decree." Consent Decree, p. A78. The Consent Decree is to "remain in effect until the goals which are a part of the Decree have been achieved." Consent Decree, p. A81.

Both government defendants—the Lorain Board and the Ohio DOE—agreed to remain subject to the jurisdiction of the court "for purposes of enforcing this Decree and the plan adopted pursuant thereto." Consent Decree, p. A81.

The Consent Decree contains certain educational and employment goals which are outlined in the "Goal Statement" made a part of the Consent Decree. The Consent Decree also includes a provision relating to the expenses incurred in implementing the objectives of the Consent Decree.

> 4. The *State of Ohio will pay* to the Lorain City School District *50 percent of the expenses* incurred by the Lorain City School District in *designing, implementing, administering and maintaining*

> *educationally sound programs reasonably expected to reduce racial isolation to the standards defined in the Goal Statement.* The State of Ohio will pay 50 percent of the unreimbursed expenses attributed to the transportation of students who are being transported for the reduction of racial isolation.
>
> * * * *
>
> The total of the expenses referred to above shall be limited to those incurred during the seven school years 1984-85 through 1990-91, and the State of Ohio payments shall not exceed $1 million during the seven year term, or 50 percent of the actual reduction of racial isolation costs, whichever is less.

Consent Decree, p. A80 (emphasis added).

The Lorain Board moved the district court for modification of the Consent Decree on January 29, 1990, and for reconsideration of its motion on June 4, 1990. Record Nos. 279, 309. The Ohio DOE opposed both motions. Record Nos. 284, 314. The Lorain Board asserted that the costs of implementing the desegregation goals greatly exceeded the Ohio DOE's original estimates, and, barring additional funds from the Ohio DOE, the Lorain Board could no longer comply with the obligations of the decree. Following a hearing on July 26, 1990, the district court ordered that the Lorain Board and the Ohio DOE enter into discussions to re-negotiate the terms of the Ohio DOE's financial contribution. Record Nos. 317, 337, 339. The Ohio DOE's response was to refuse to pay any additional money and to belatedly place blame on the Lorain Board for not foreseeing its fiscal problems. Record Nos. 340, 352.

The district court held extensive evidentiary hearings during April and May 1991 and found as a matter of fact that the Lorain Board's position was supported by the evidence. 768 F. Supp. at 1244, p. A69.

The district court found that the Ohio DOE greatly miscalculated the total cost of the desegregation plan at the time of settlement, thus underestimating its own share, and that its cost analysis was unsupported by the Ohio DOE's own evidence.

Although the Ohio DOE's one million dollar contribution to Lorain was justified as being proportionate to the Ohio DOE's contribution for the Cincinnati school desegregation program, the Ohio DOE admitted at the modification hearing that the funds given to Cincinnati were actually for far fewer students—less than one-third the number that the Ohio DOE originally used in its estimates. Record No. 386 at 57-59. The district court found that the Ohio DOE provided Lorain with a "wholly unrealistic" estimate of the costs of the plan to achieve the goals. 768 F. Supp. at 1244, p. A70. The district court considered this gross miscalculation in light of the Ohio DOE's agreement to share the desegregation costs equally with the Lorain Board over a 7-year period.

In addition, the district court found that the Ohio DOE failed to consider the bilingual program costs, which the court held were included in the Ohio DOE's obligations under the Consent Decree. 768 F. Supp. at 1244 n.25, p. A70; *Brown v. Neeb*, 644 F.2d 551, 558 n.12 (6th Cir. 1981) (district court's view on the interpretation of a consent decree is entitled to deference where there is ambiguity).

Based on the abundant evidence of substantially changed circumstances, the unsupported basis for the Ohio DOE's initial cost calculations, and the Ohio DOE's failure to negotiate the financial issues, the district court ordered a modification of the Consent Decree.

In the exercise of its equitable powers, the district court designed a solution to ensure the continued viability of the Consent Decree and the achievement of the remedial goals. The modification increased the amount of the Ohio DOE's contribution and imposed additional requirements on the Lorain Board to effect cost-cutting and revenue-raising measures.

The Sixth Circuit disagreed with the district court's remedy, and it reversed the decision. 979 F.2d 1141, p. A1. To relieve the Ohio DOE from paying any money and to sidestep the evidentiary record, the Sixth Circuit constructed a brand new rule which severely constrains the district court's equitable power in this matter. Importantly, the Sixth Circuit ignored the district court's finding of a real probability that, absent modification, the Consent Decree goals in this case would not be achieved.

The Sixth Circuit's new rule rewards the Ohio DOE for its flawed cost analysis and the resulting inequity to the Lorain Board, even though the Ohio DOE through its own conduct created the inequity sought to be corrected by the modification. Courts of Appeals should not retry cases or create some legal artifice solely to impose a different result on a decision. Yet that is precisely what happened here. If allowed to stand, the appellate panel's new rule permits a government defendant such as the Ohio DOE to use as a shield its decision to settle and avoid any finding of liability.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Presents Important Issues Of Federal Constitutional Law And Inherent Judicial Authority Which Should Be Decided By This Court.

Institutional reform consent decrees are a critical judicial tool for eliminating the vestiges of discrimination in our public institutions and schools. While they are entered into voluntarily by the parties to avoid costly and prolonged litigation, institutional reform consent decrees are subject to long-term monitoring and implementation by the district court. The fundamental purpose of these consent decrees and the essence of the district court's authority is to ensure that the constitutional violations at the heart of the consent decree are corrected.

As this Court has recognized, the district court directly involved with the parties needs flexibility to administer such decrees due to changing conditions and the impact of the remedial orders on the public. While the district court does not have unfettered discretion in this matter, its equitable powers are not so limited that it cannot act at all.

Accordingly, this case presents the Court with the opportunity to further define the district court's "flexible" authority to modify institutional reform consent decrees. This Court can decide that the district court's authority includes imposing additional financial obligations on a government party to a consent decree where substantially changed circumstances warrant the modification. *See, e.g., San Francisco NAACP v. San Francisco Unified School District,* 896 F.2d 412 (9th Cir. 1990) (modification based on changed circumstances includes extrinsic evidence as to the intent of the parties to support increasing government funding of desegregation costs).

With the wide-spread use of consent decrees in institutional reform cases, there is a new uncertainty as to the viability of existing consent decrees in the Sixth Circuit and elsewhere in the country. This Court should decide now whether the Sixth Circuit's perceived need to protect the Ohio DOE from any additional obligations justifies abruptly cutting off parties' rights years after settlement, or incurring new federal litigation, or risking breach of the consent decree and failure to correct constitutional violations in public institutions. For these reasons, the case merits this Court's review.

A. This Court has ruled that the appropriate standard for modification of institutional reform consent decrees is evidence of "changed circumstances."

Institutional reform consent decrees are fundamentally different from those affecting private parties. These decrees involve governmental entities and raise issues of great public import, such as school desegregation and affirmative action. In January 1992, this Court adopted the "flexible standard" for modifying institutional reform consent decrees. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. _____, 112 S. Ct. 748 (1992). This Court held that the strict "grievous wrong" standard of *United States v. Swift & Co.*, 286 U.S. 106 (1932), applied to private party consent decrees, is inappropriate for modifying institutional reform consent decrees.

> The upsurge in institutional reform litigation since Brown v. Board of Education, 347 US 483, 98 L Ed 873, 74 S Ct 686, 38 ALR2d 1180 (1954), has made the ability of a district court to modify a decree in response to changed circumstances all the more important. *Because such decrees often remain*

> *in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased.*

Rufo, 112 S. Ct. at 758 (citations omitted) (emphasis added).

Rufo holds that a party seeking modification of an institutional reform consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstances. *Rufo*, 112 S. Ct. at 764. This Court has never imposed a requirement that liability of the defendants be established or admitted before a decree can be modified. It has never addressed the issue of whether a district court is precluded from imposing additional financial obligations on a government defendant. Yet the ink on the *Rufo* decision was barely dry before the Sixth Circuit panel grafted on new requirements to this Court's rule set forth in *Rufo*.

In defining the principles governing this modification standard, this Court looked to the experience of the several circuits which had utilized this approach, including the Sixth Circuit. *Heath v. DeCourcy*, 888 F.2d 1105 (6th Cir. 1989) (adopted "flexible standard" to modify consent decrees). It found that an important reason for adopting the flexible standard is the public's strong interest in governmental institutions free of constitutional deficiencies.

> The Courts of Appeals have also observed that the public interest is a particularly significant reason for applying a flexible modification standard in institutional reform litigation because such decrees "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions." *Heath v.*

> *DeCourcy*, 888 F.2d 1105, 1109 (CA6 1989). Accord *New York State Assn. for Retarded Children, Inc. v. Carey*, [706 F.2d 956], 969 [2d Cir. 1983].

Rufo, 112 S. Ct. at 758-59.

One of the principles supporting this approach is that broader judicial discretion is essential to permit fine-tuning of the decree to accomplish its goals of correcting constitutional violations. "Time and experience may yield new knowledge that compels modification of the original agreement if its end, the operation of the institution in a manner that meets constitutional conditions, is to be met." *Heath v. DeCourcy*, 888 F.2d at 1109.

This Court has consistently ruled that the district court must ensure that the fundamental goals and purpose of the consent decree are achieved. *Rufo*, 112 S. Ct. at 763; *Bd. of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237, 111 S. Ct. 630, 638 (1991). It stands to reason that the district court cannot remain powerless to act where the failure to modify the consent decree actually creates or perpetuates a constitutional violation.

> The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision. In this respect, as we observed in *Swann*, "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interest, the condition that offends the Constitution." *Swann* [*v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)] at 15-16.

Freeman v. Pitts, 503 U.S. _____, 112 S. Ct. 1430, 60 U.S.L.W. 4286, 4292 (1992).

The district court must consider whether the parties have complied in good faith with the consent decree and determine whether the "vestiges of past discrimination ha[ve] been eliminated to the extent practicable" before it can dissolve the decree and thus relieve a party of any further obligations. *Dowell*, 111 S. Ct. at 638. In fact, judicial supervision does not end until the purposes of the consent decree have been fully achieved and all outstanding claims of violations have been addressed by the district court. *Youngblood v. Dalzell*, 925 F.2d 954, 960 (6th Cir. 1991); *United States v. City of Cincinnati*, 771 F.2d 161 (6th Cir. 1985).

Even where there is technical compliance with a critical provision of the decree, the district court cannot relieve a party from compliance with that provision if the basic intent of the decree has not been fulfilled. *Jansen v. City of Cincinnati*, 977 F.2d 238 (6th Cir. 1992) (district court must evaluate numerical hiring requirement in conjunction with goals which that requirement was designed to achieve); *accord Dowell*, 111 S. Ct. at 637-38; *Freeman v. Pitts*, 60 U.S.L.W. at 4292.

District courts even have a duty to issue new remedial orders where, when considering ending its supervision in a school desegregation case, the court finds that the underlying dual system of education has not been fully eliminated. *Freeman v. Pitts*, 60 U.S.L.W. at 4294. This Court has ruled that these new orders may be imposed on the parties, even if the parties have substantially complied with all prior desegregation requirements.

B. The Sixth Circuit decision significantly departed from the general principles governing consent decrees and ignored the district court's findings, premising its new rule on a standard contract clause disclaiming liability of the defendants.

The Sixth Circuit decision does not follow *any* of the fundamental principles set down by this Court.[2] Because it disagreed with the result reached by the district court, the Sixth Circuit focused on a standard liability disclaimer found in any settlement agreement which it viewed as pivotal to its decision. Ignoring the wealth of evidence elicited in the hearings below and the factual findings of the district court, the appellate panel assigned undue significance to pro forma legal drafting.

That disclaimer should not bar modification of an institutional reform consent decree. *Stuart v. Roache*, 951 F.2d 446, 453 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1948 (1992) (a liability disclaimer has only limited value); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1460 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 938 (1992) (same). A consent decree is a settlement reached among the parties

[2] Instead, the Sixth Circuit followed two appellate cases, neither of which are about school desegregation. Both applied the *Swift* strict standard for modification of institutional reform consent decrees, which this Court has rejected. *Fox v. Department of Housing & Urban Development*, 680 F.2d 315 (3d Cir. 1982) and *Walker v. Department of Housing & Urban Development*, 912 F.2d 819 (5th Cir. 1990). The proposed modifications in both cases added new elements to the consent decree which were not part of the decree and were never contemplated by the parties.

Also, *United States v. Michigan*, 940 F.2d 143 (6th Cir. 1991), relied on by the Sixth Circuit, deals with a prison reform consent decree. There, the modification orders extended the inmate classification plan to other prison facilities which were not even named in the original consent decree. Moreover, there was nothing in the record to support extending the plan to other prison facilities not even considered in the decree.

and entered by the court in lieu of litigation. It represents a compromise of certain claims and defenses with the clear understanding that there will be no admission of liability. Defendants will usually not agree to settle unless that clause is in the decree.

Once it has entered into a consent decree, a defendant cannot avoid its obligations by forcing the plaintiffs to later establish its liability. *Duran v. Carruthers*, 885 F.2d 1485, 1490 (10th Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990) (by entering into consent decree, state prison officials "waived their right to make plaintiffs establish at trial that they were entitled to all the relief afforded them by the consent decrees").

C. The district court should consider all the facts and circumstances bearing on modification of an institutional reform consent decree, including the interests of all the parties and the public.

The district court should consider the circumstances and context which led the parties to enter into the consent decree. *Brown v. Neeb*, 644 F.2d 551, 562 (6th Cir. 1981). In this case, that background was illuminating. Here, the district court found that the Ohio DOE's earlier involvement in protracted school desegregation litigation in Cleveland, Columbus and Dayton was highly significant.[3] *See Reed v. Rhodes*, 500 F. Supp. 404, 410-16 (N.D. Ohio 1980), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied* 455 U.S. 1018 (1982)

[3] This Court has even remarked about Ohio's long history of school desegregation litigation involving both the State of Ohio and the local school board. In each of these earlier desegregation cases, this Court has "without hesitation approved comprehensive and continued district court supervision" in light of the demonstrated lack of good faith in remedying on-going violations. *Freeman v. Pitts*, 60 U.S.L.W. at 4295.

(the state shares equally the responsibility "for implementing a remedy which will eliminate all vestiges of unconstitutional segregation"); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (liability based in part on defendant's refusal to dismantle the dual system of education); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979) (finding intentional and purposeful segregative practices).

The Ohio DOE's own witness testified that the history and outcome of these cases pushed the Ohio DOE to agree to the Consent Decree. Record No. 386 at 84-87, 90-93. In each of these cases, the State of Ohio was found jointly liable with the local school board for acts of commission and omission in fostering segregated school environments. When this case involving the Lorain public schools was filed in 1979, the Ohio DOE was anxious to settle and to avoid the heavy costs of litigation and the certainty of an adverse verdict. 768 F. Supp. at 1238, p. A56.

The Sixth Circuit dismissed this background as having no relevance to modification. Its new rule that the district court cannot impose a burden on a *defendant* absent liability is both illogical and inequitable. The defendant Ohio DOE agreed to correct the constitutional deficiencies outlined in the Consent Decree, which the Ohio DOE itself believed existed in Lorain. The Sixth Circuit decision relieved the Ohio DOE of that obligation.

The Sixth Circuit gave undue deference to how the *Ohio DOE* is affected by the modification, even though a district court must consider the interests of the *parties and the public. Equity functions equally for all the parties.* The parties to a settlement are in equipoise. Any relief of a burden for one party necessarily imposes a burden on another party. After all, "every modification, by definition, will alter an obligation of a decree."

> Deference to one of the parties to a lawsuit is usually not the surest path to equity.... The inmates have as much claim as the prison officials to an understanding of the equities. The District Court should be free to take the views of both sides into account, without being forced to grant more deference to one side than to the other.

Rufo, 112 S. Ct. at 767-68 (O'Connor, *J.*, concurring).

This case concerns the lengthy and difficult process of dismantling segregative practices in the education of young children in a mid-West community. There is no dispute that, until this current court battle, the local desegregation efforts have been successful. The student enrollment of approximately 50% white, 25% Black and 25% Hispanic students remained stable during the transition. Voluntary desegregation brought little disruption to the school community or to the community at large. The Lorain Board's increasing fiscal problems compounded by the Ohio DOE's refusal to negotiate—in fact, the Ohio DOE's public accusations of mismanagement leveled against the Lorain Board—have been destructive of this stability. The result of the appellate decision ignores the interests of the other governmental defendant Petitioner the Lorain Board, as well as the plaintiff Petitioners the Lorain NAACP and CHIP, and especially the public.

The Sixth Circuit lost sight of the fact that there are *two* government defendants in this case, who have equal and shared obligations under the Consent Decree. There is no finding of liability against either government defendant. The Lorain Board moved for relief against the Ohio DOE because of the higher than expected financial burden resulting from the decree. The Lorain Board should have a right to relief from that burden, particularly since the district court found as a matter of fact that the burden was unforeseen and inequitable. The

district court in ordering the Ohio DOE to pay more was merely enforcing an order the Ohio DOE had already agreed to as being in the best interests of the plaintiffs.

Regardless of the cost, a governmental agency is required to operate its institutions in a constitutionally proper manner. A government defendant cannot simply cry poor and thereby relieve itself from a previously agreed to order. To do so leaves the plaintiffs without any remedy, even though they agreed for the public good to settle rather than litigate.

Plaintiffs are entitled to the benefits of a remedial order which both defendants were equally responsible to abide by and enforce. The agreement between the co-defendants as to how the desegregation costs would be shared should have no bearing on whether the order continues to be implemented for the plaintiffs' benefit.

The Sixth Circuit decision ignores the plaintiffs' right to have the Consent Decree and subsequent remedial order enforced. Plaintiffs were and are entitled to enforcement of the remedial order against *both* defendants.

D. The Sixth Circuit's new and inflexible rule will have grave consequences for parties to consent decrees.

Under the Sixth Circuit's new rule, the district court now has no option but to watch the Consent Decree unravel, after nearly ten years of work to achieve its goals. The evidentiary record below revealed the extent of the Lorain Board's fiscal problems resulting from the operation of the Consent Decree: (1) funding has been substantially reduced for magnet programs, including those designed expressly for desegregation; (2) sports and extracurricular programs have been virtually eliminated; (3) teachers have been laid off; (4) minority

hiring in accord with the Consent Decree is stalled; and (5) for the first time since the Consent Decree went into effect in 1984, student enrollment in the Lorain public schools has declined precipitously. *See* 768 F. Supp. at 1237, pp. A54-55; Record Nos. 469, 471, 508, 518. The fiscal crisis and the possibility of state receivership only fuel public uncertainty about the future of the Lorain schools. These are the practical effects of the Sixth Circuit decision, since the district court is powerless to modify the Consent Decree.

The Sixth Circuit decision has grave consequences for all civil rights litigants and the courts. This new *per se* rule will have a chilling effect on plaintiffs' willingness to sign consent decrees with government agencies unless the government admits to violations of law. Forcing these parties to litigate will be enormously costly to the public, unduly delay remediation of civil rights violations, and further congest an already-overburdened court system.

Next, it imposes a nearly insurmountable burden on parties to an existing consent decree. The Sixth Circuit's decision requires plaintiffs to establish liability before the district court can modify the consent decree even to address changed circumstances. The only recourse for litigants such as Petitioners under the Sixth Circuit's new rule is to try a lawsuit that was ripe 15 years ago. This is a harsh and inequitable burden for parties to existing consent decrees.

The Sixth Circuit's inflexible rule severely constrains the district court in the exercise of its equitable power, since as a practical matter, there has been no adjudication or admission of liability in many long-standing institutional reform cases. This result directly contradicts this Court's teaching in *Rufo* that *greater* judicial discretion is required in the administration of institutional reform consent decrees.

The Sixth Circuit decision has departed so far from the fundamental principles of *Rufo*, *Dowell*, and *Pitts* that it must be reviewed by this Court. If left to stand, the damage to current and future civil rights litigants will be irreparable.

II. This Court's Rules On The Appropriate Functions Of Federal District Courts And Courts Of Appeals Were Ignored By The Sixth Circuit.

This case also presents an important opportunity for this Court to instruct all district and appellate courts as to the proper limits of district court action and appellate review. Since a specific legal standard of "changed circumstances" applies in a modification order, the Sixth Circuit incorrectly reviewed this case on an abuse of discretion standard.

Federal appellate review in this case is clearly limited. Where there are findings of fact and conclusions of law, a court of appeals is not permitted to re-decide the facts of a case or impose a result different from the district court merely because the appellate panel disagrees with the outcome below.

> On appeal, the task of a court of appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the district court are clearly erroneous, it may set them aside under Fed. Rule Civ. Proc. 52(a). If it decides that the district court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors.

Dayton Bd. of Educ. v. Brinkman, 443 U.S. 406, 417-18 (1977).

Under this Court's rules, appellate courts must specifically determine that the factual findings of the district court are clearly erroneous based on the evidentiary record before it. Otherwise, the appellate court is bound by those facts.

The Sixth Circuit did not find that the district court's findings of fact were clearly erroneous. Focusing on only a few findings, the court of appeals merely stated that it interpreted some of the evidence differently from the district court. Thus, the court of appeal's review was limited to whether the district court applied the proper legal standard.

The Sixth Circuit held that the district court applied the correct law. Citing this Court's ruling in *Rufo*, the court of appeals affirmed that evidence of "changed circumstances" warrants modification of an institutional reform consent decree. Thus, the court of appeals did not find that legal error occurred below. 979 F.2d at 1149, pp. A13-14.

Under the proper standard of review, the Sixth Circuit could not change the result reached by the district court based on the record before it. Thus, the court of appeals fashioned a new legal requirement—without any legal precedent—in order to change the result below. In focusing on the *outcome* of the district court's order rather than the methodology of the court's analysis, the Sixth Circuit ultimately decided the modification issue *de novo*. *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (appellate review of equity decrees is narrow); *Rufo*, 112 S. Ct. at 765 (O'Connor, *J.*, concurring) (appellate court's examination is to the "*method* in which the District Court exercises its discretion, not the substantive outcome the District Court reaches"). This departure from appropriate review standards merits instruction from this Court.

An additional issue before this Court concerns the district court's authority in resolving questions where there is ambiguity in the consent decree. This Court can decide that the district court can consider extrinsic evidence and make findings about the fundamental intent and purpose of a consent decree. *See, e.g., San Francisco NAACP v. San Francisco Unified School District,* 896 F.2d 412 (9th Cir. 1990) (extrinsic evidence as to the intent of the parties on government funding of desegregation costs can support modification based on changed circumstances).

The Ohio DOE has continually insisted that its obligation under the Consent Decree is limited to one million dollars only. It claims that the district court has *no* authority to impose any additional requirements on it. The Ohio DOE has been so adamant on this point that, on appeal, it even asserted that "the core intent [of the consent decree] was that DOE's liability would be limited to 1 million dollars." Appellant's Brief at 19.

The Lorain Board agreed to that one million dollar cap based on the Ohio DOE estimates, which the district court found were "wholly unrealistic." Yet an ambiguity arose as to what the two governmental defendants had intended—and what the plaintiffs understood was intended—because the Ohio DOE also agreed in the Consent Decree that it

> will pay [to the Lorain Board] 50 percent of the expenses incurred . . . in designing, implementing, administering and maintaining educationally sound programs reasonably expected to reduce racial isolation to the standards defined in the Goal Statement.

Consent Decree, p. A80.

Part of the dispute below also concerned the costs of the bilingual program. The Ohio DOE denies that it is obligated under the Consent Decree to share in the costs of the bilingual program. In fact, the Ohio DOE admitted that it did not pay any money toward the bilingual program, nor did it consider the bilingual program in its estimates of the desegregation costs. Record No. 386 at 124-25.

Clearly, this conflict between the Ohio DOE and Petitioners goes to the heart of the Consent Decree. Because the parties were unable to resolve their differences, the district court was obligated to determine the intent and the purpose of the Consent Decree and to resolve the conflict. *Brown v. Neeb*, 644 F.2d 551, 558 n.12 (6th Cir. 1981) (district court's view on the interpretation of a consent decree is entitled to deference where there is ambiguity).

The Sixth Circuit determined that the district court should not have considered evidence such as the Ohio DOE's involvement in school desegregation litigation in Cleveland, Columbus, Dayton and Cincinnati and its motivation in settling the case. *See, supra* at 18-19. Yet the district court must consider the circumstances and context which led the parties to enter into the consent decree when it fashions a modification order. *Brown v. Neeb*, 644 F.2d at 562.

The district court's role is critical here. The trial judge has had "years of experience with the problem at hand." *Hutto v. Finney*, 437 U.S. 678, 688 (1978). The district court probably participated in drafting the consent decree. It has certainly closely monitored achievement of the remedial goals.

This case presents an important opportunity for this Court to exercise its supervisory powers and re-direct a Circuit which has departed greatly from the standards of appellate review. For this reason, this case merits this Court's review.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 91-3666/3667

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LORAIN NAACP, et al.,
Plaintiffs,

v.

LORAIN BOARD OF EDUCATION,
Defendant-Appellee,
Cross-Appellant,

OHIO DEPARTMENT OF EDUCATION,
Defendant-Appellant,
Cross-Appellee,

COALITION FOR HISPANIC ISSUES AND PROGRESS,
Intervenor-Appellee,

LEO SVETE,
Defendant.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed November 12, 1992

Before: RYAN and SUHRHEINRICH, Circuit Judges; and CHURCHILL, Senior District Judge.*

RYAN, Circuit Judge. This case is an appeal from a judgment modifying a 1984 school integration consent decree. The modification, among other things, substantially increased the financial obligations of the Ohio Department of Education, a voluntary participant in the original school desegregation plan. In a Memorandum Opinion and Judgment, entered June 21, 1991, the United States District Court for the Northern District of Ohio eliminated an express $1 million limitation on the liability of the State of Ohio Department of Education contained in the desegregation consent decree and ordered the State to contribute an estimated $9 million to its co-defendant, the Lorain Board of Education, to assist in the voluntary desegregation of the Lorain public school system. *See Lorain NAACP v. Lorain Bd. of Educ.*, 768 F. Supp 1224 (N.D. Ohio 1991). We are asked to decide whether the district court acted within its discretion in increasing the State's financial obligations under the decree beyond the scope of its consent and in the absence of an adjudication or admission of wrongdoing. We think the court exceeded its authority in modifying the consent decree as it did, and we shall, therefore, reverse.

I.

In 1979, the Lorain, Ohio branch of the National Association for the Advancement of Colored People and a number of black and Hispanic students and parents of students in the public schools in the Lorain City School District instituted this desegregation action. In their complaint, plaintiffs alleged that defendants--Lorain Board of Education and its individual members, the Ohio State Board of Education and its individual members, and the

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*The Honorable James P. Churchill, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

state and local public school superintendents--"ha[d] effected racial segregation and discrimination in the operation of the Lorain public schools" by the closing of certain school facilities, the assignment of students, and the hiring and assignment of teachers and administrators.

Prior to an adjudication on the merits of plaintiffs' complaint, the parties settled all claims. In a consent decree entered into by the parties and approved by the district court in 1984, the parties "waived the need [for the district court] to make findings of fact and conclusions of law on all issues raised in the complaint, except the issue regarding plaintiffs' right to and the amount of attorney fees incurred in prosecution of this action." Certain affirmative duties were assigned to defendants by the terms of the decree, but all parties agreed that "nothing in this Consent Decree shall be construed as an admission by any of the defendants of any violation of any provision of the Constitutions of the United States or the State of Ohio."

Under the terms of the consent decree, responsibility for designing and implementing a desegregation plan fell upon the Lorain Board of Education. Its first duty was to "immediately . . . begin to develop a plan by which the objectives outlined in the Goal Statement will be achieved . . . ." These objectives included eliminating racially identifiable schools and establishing in each school a composite minority student ratio of no more than a plus 20% or minus 15% deviation from the average racial composition in the school district; retaining an independent contractor to evaluate Lorain's bilingual programs, eliminating shortcomings discovered in the evaluation process, and adequately maintaining bilingual programs for Hispanic students in compliance with state and federal law; providing for student transfers from their assigned school to other schools unless the transfer adversely affected racial composition in the schools and equitably allocating the burdens of school assignments and closings between non-white and white students and between various neighborhoods; and establishing minority

employment in the district at levels equal to the racial composition of the adult population of Lorain by increasing minority hirings of both certified and uncertified personnel.

The State of Ohio's only obligations under the consent decree consisted of specified financial contributions to Lorain. The consent decree states:

> The State of Ohio will pay to the Lorain City School District 50 percent of the expenses incurred by the Lorain City School District in designing, implementing, administering and maintaining educationally sound programs reasonably expected to reduce racial isolation to the standards defined in the Goal Statement. The State of Ohio will pay 50 percent of the unreimbursed expenses attributed to the transportation of students who are being transported for the reduction of racial isolation. "Unreimbursed expenses" shall mean the portion of this expense which remains after deducting the state transportation reimbursement applicable to students involved in such transportation.
>
> The total of the expenses referred to above shall be limited to those incurred during the seven school years 1984-85 through 1990-91, and the State of Ohio payments shall not exceed $1 million during the seven year term, or 50 percent of the actual reduction of racial isolation costs, whichever is less.
>
> Beginning in December 1984, payments made by the State shall be made semi-annually in the months of December and June upon submission of vouchers covering costs actually incurred by the Lorain City School District. Such payments shall be in addition to all other state and federal funds to which the Lorain City School District may be entitled under law and regulations existing at the time of the submission of the vouchers.

. . . .

> The parties agree that the Lorain City School District shall retain an independent contractor to evaluate the bilingual programs currently in effect to determine program effectiveness. The cost of such evaluation shall be considered part of the cost of implementation of the Consent Decree and up to 50 percent of the cost shall be reimbursed by the State of Ohio . . . .

Initially, the parties were unable to reach an agreement on a single plan to achieve the objectives of the consent decree, particularly the means by which to achieve school building and classroom racial composition goals. The Board proposed a magnet school program involving the voluntary transfer of students within the district, while plaintiffs preferred a system of involuntary student reassignments. The district court held hearings on this dispute and other matters of concern in March 1985. Eventually, the district court approved the implementation of the magnet program proposed by the Board, beginning in the 1985-86 school year, but conditioned continuation of the program on achievement of the targeted racial composition ratios established by the decree. The district court also approved the Board's proposals to evaluate Lorain's bilingual program and established monitoring procedures for the attainment of minority hiring goals.

A.

A brief description of the scope and cost of the principal features of the desegregation plan may be helpful to an understanding of the context in which the district court was asked to modify the consent decree.

At the time the parties entered into the consent decree, six schools were out of compliance with the racial composition goals established by the parties, and the parties estimated that approximately 650 students would have to be moved to meet the goals of the decree. It was

later determined that it was necessary to move 1200 students in order to reach and maintain desegregation goals. By 1990, seventeen of Lorain's twenty-one schools, and approximately 3500 of its 12,300 students, were involved in the magnet program, even though the district court found that only 1300-1350 were necessary to meet the goals established in the consent decree. Lorain has employed over 100 additional teachers, administrators, and clerical staff, including a desegregation specialist, to implement and maintain its magnet school program even though the student population remained relatively constant at 12,000. Student racial balance within the goals established by the consent decree has been successfully achieved and maintained in Lorain under the magnet school program.

Although some bilingual education was already available at the time of the decree, the decree-required independent evaluation of these programs led to Lorain's development of a core bilingual program to meet the needs of English language deficient students. Four school buildings in Lorain are used to house different aspects of the bilingual program, each focusing on students with varying levels of English-language skills. In the 1986-87 school year, Lorain reopened the Palm Academy building for instruction of younger students lacking any English-speaking skills and for those needing primary instruction in Spanish while acquiring fluency in English. Because the curriculum at the Palm Academy was focused on bilingual education and thus drew a high concentration of Hispanic students, the Board, recognizing that the building would be out of compliance with the racial composition percentage requirements established by the consent decree, also established a magnet Montessori school in the Palm Academy, drawing white, black, and Hispanic children. In 1990, the district court exempted the bilingual program at the Palm Academy from the racial composition mandates of the consent decree, but ordered that the Montessori program remain in compliance with the decree's racial balancing requirements. Since the implementation of a

comprehensive core bilingual program in Lorain, test scores have improved and the district has been able to mainstream and retain larger numbers of Spanish-speaking students.

Lorain has had some difficulties, however, in attaining the hiring and employment goals established by the consent decree. While approximately 12% of the adult population in Lorain is black and 14% Hispanic, the school district has been unable to achieve these racial and ethnic composition levels in its professional employee ranks. Lorain has made continuous efforts to meet the hiring requirements set forth in the consent decree, including increasing teacher salaries, directing advertisements and vacancy notices toward recruiting minorities, participating in the Ohio Minority Recruitment Consortium, establishing contacts with minority organizations to aid in the recruitment and retention of minority applicants, having personnel staff members travel to colleges in and beyond Ohio to recruit and interview prospective minority teachers, and paying the transportation costs of minority applicants willing to travel to Lorain for interviews. Lorain's location and inability to offer salaries competitive with other school districts, however, have hindered its minority hiring efforts.

Lorain has also sought to meet hiring goals established in the consent decree by opening up teaching and administrative positions through an early retirement incentive (ERI) program. The ERI plan has proved costly in the short term, with Lorain exposing itself to over $9 million in potential liability. As a result, Lorain was forced to negotiate a new contract with its teachers and administrators to establish a cut-off date for participation in the ERI program. In return for this concession, Lorain promised 5% pay raises in each of five years beginning in August 1991, in addition to the 10% increase effective January 1990 and another 6.5% increase effective August 1990. In the end, the twenty-four teachers and two administrators who took advantage of early retirement cost Lorain over $2.9 million in fiscal year 1991. As the

result of salary increases, Lorain's average teacher's salary increased to over $34,000 in 1991, up from about $29,000 the previous year. Lorain expends 97.5% of its total revenue on salaries and fringe benefits, while most school district spend about 85% on these expenses.

Accomplishing and maintaining compliance with the requirements established by the consent decree, and meeting other budgetary demands, have, of course, cost money, and this is where the present dispute between Lorain and the State of Ohio has arisen. By the third year of implementation of the desegregation plan, the State had already paid the entire $1 million that was its obligation under the consent decree. Lorain relied on $3.4 million in federal grants to offset the costs of the desegregation plan, but its grant request for the 1991 fiscal year was rejected. Facing shortfalls, Lorain eliminated some academic and extracurricular programs and reduced certain support and transportation services.

B.

In January 1990, the Board filed a motion to increase the State of Ohio's contributions to Lorain's desegregation plan. The Board argued that without additional financial contributions from the State, desegregation goals would be jeopardized and the purposes of the consent decree thwarted. Initially, the district court denied Lorain's motion to increase the State's share of the costs of desegregation, holding that "[t]he language of the Consent Decree clearly limits the State's financial exposure to the cost of the desegregation plan . . . to $1 million dollars or 50 percent of the actual cost, whichever is less" and finding "no provision in the consent decree for increased contribution on the part of the State should the cost of the desegregation plan exceed the original estimate."

Lorain then filed a motion for reconsideration. Following a hearing, the district court indicated that it was inclined to modify the decree and ordered the State of Ohio to renegotiate the terms of its financial arrangement

with Lorain. The parties were unable, however, to agree to any revisions to the consent decree with respect to state funding. The district court, after additional hearings, modified the terms of the decree by eliminating the $1 million ceiling on the State's financial liability to Lorain. The district court noted that the State of Ohio "clearly agreed to make a financial contribution to the Lorain desegregation plan" and then went on to explain:

> Granted, the Consent Decree provides for a $1 million cap on the State's contribution. However, the Court has made extensive fact findings which support the Court's conclusion that modification is warranted in the present case with respect to the amount of the State's contribution. This is not a case . . . where the Court is attempting to argue that the language of the Consent Decree provides for State Funding beyond the $1 million cap. The Court acknowledges that the Consent Decree as it now stands does not provide for additional state funding. However, the Court finds, for the reasons set forth with specificity below, that a modification is warranted under the standard set forth by the Sixth Circuit . . . .

The district court reasoned that time had made apparent that Lorain school officials, who lacked knowledge and experience in desegregation matters, had not negotiated an equitable arrangement in agreeing that the State's liability would be limited to $1 million, and in utilizing cost calculations based upon a faulty and unrealistic comparison to desegregation measures taken in Cincinnati. The district court found that the State and Lorain originally fixed the State's obligations by comparing the measures to be taken in Lorain with the desegregation program previously instituted in Cincinnati, where the State, after arduous negotiations, agreed to contribute $35 million to the school district's desegregation program. In Cincinnati, approximately 17,000 students were involved in a magnet school program. In Lorain, the parties estimated that 500 to 650 would have to be involved to

achieve the racial composition requirements. Thus, $1 million was proposed as a cap upon the State's liability, based on an approximate 35 to 1 ratio of students to be moved in Cincinnati and in Lorain.

The district court concluded that the liability cap had to be modified given that time and experience had shown that the parties had grossly underestimated the costs of desegregation and that the comparison between the State's involvement in Lorain and in Cincinnati was flawed. The district court also noted that the State had been ordered to pay 50% of desegregation costs in Cleveland, Columbus, and Dayton, and drew comparisons between the State's contributions in those cities and the relatively meager state funding received by Lorain.

The district court ordered the State to pay 50% of Lorain's desegregation costs for the 1989-90 school year, in the amount of $2,600,917, and a descending percentage of desegregation costs over the next four years, ranging from 40% for the 1990-91 school year to 10% for 1993-94. The district court held that at that point the State of Ohio's obligations to the Lorain desegregation plan would cease under the modified decree. The district court estimated that the State of Ohio's payments under the modified decree will amount to approximately $9 million. The State was also assessed interest on its contributions to Lorain and ordered to pay attorneys' fees incurred by the Board and CHIP in seeking an increase in state funding.

The State of Ohio has appealed and the Lorain Board of Education has cross-appealed.

II.

The Lorain school desegregation consent decree is injunctive in nature, and appellate jurisdiction over the district court's modification of the decree therefore attaches under 28 U.S.C. § 1292(a)(1).[1] *See Bradley v.*

[1] In pertinent part, section 1292 provides:

Milliken, 772 F.2d 266, 270-71 (6th Cir. 1985). We review a district court's modification of a consent decree under an abuse of discretion standard. *United States v. Michigan*, 940 F.2d 143, 159 (6th Cir. 1991). "'A district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard.'" *Black Law Enforcement Officers Ass'n v. City of Akron*, 824 F.2d 475, 479 (6th Cir. 1987) (quoting *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1356 (6th Cir.), *cert. dismissed*, 469 U.S. 1200 (1985)).

III.

The district court addressed much of its attention, as the parties to this appeal did, to the issue of the proper standards to be applied in deciding Lorain's request for a modification of the consent decree to increase the State's financial liability. The State of Ohio argues that a strict standard is to be applied, while Lorain and CHIP contend that the district court correctly applied a relaxed modification standard. We shall address this issue as part of a general discussion of the nature and treatment of consent decrees, and the role of the courts in interpreting, enforcing, and modifying their terms.

The consent decree is "a strange hybrid in the law." *Brown v. Neeb*, 644 F.2d 551, 557 (6th Cir. 1981). It is at once "a voluntary settlement agreement which could be fully effective without judicial intervention" and "a final judicial order . . . plac[ing] the power and prestige of the court behind the compromise struck by the parties." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983).

> (a) [T]he courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions . . . .

28 U.S.C. § 1292.

Thus, a consent decree is aptly described as "a settlement agreement subject to continued judicial policing." *Id.*

Since consent decrees and orders share many of the attributes of ordinary contracts, "they should be construed basically as contracts, without reference to the [claims the plaintiffs] originally sought to enforce but never proved applicable through litigation." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975). Furthermore, the Supreme Court has stated that "'the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other . . . .'" *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 522 (1986) (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971)). For these reasons, "the 'scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it' or by what 'might have been written had the plaintiff established his factual claims and legal theories in litigation.'" *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574 (1984) (quoting *Armour*, 402 U.S. at 681-82).

Although interpretation of a consent decree is to follow the general rules prescribed in contract law, the courts, in effectuating the purposes or accomplishing the goals of a decree, are not bound under all circumstances by the terms contained within the four corners of the parties' agreement. Because of their dual character, consent decrees may be "treated as contracts for some purposes but not for others," *ITT Continental Baking*, 420 U.S. at 236 n.10, and modification may be justified when a court is "satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932). In *Swift*, the Supreme Court stated that "[n]othing less than a clear showing of grievous wrong" would support the modification of a consent decree. *Id.* at 119. The Court, however, recently abandoned the rigid *Swift* standard and declared a lesser showing sufficient for

modification of consent decrees entered in settlement of so-called "institutional reform" litigation involving and affecting the operation of governmental institutions or organizations. *See Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 758-60 (1992); *accord Heath v. DeCourcy*, 888 F.2d 1105, 1108-09 (6th Cir. 1989).

A less stringent modification standard in these cases is justified for a variety of reasons. First, institutional consent decrees are "fundamentally different" from consent decrees between private parties because the former "affect more than the rights of the immediate litigants." *Heath*, 888 F.2d at 1109. Next, broader judicial discretion to modify the parties' agreement "is required so that the agreed upon solution to the problem giving rise to the litigation may be fine-tuned to accomplish its goal." *Id.* "The experience of the district and circuit courts in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation." *Rufo*, 112 S. Ct at 758. The courts' ability to more easily modify consent decrees in institutional reform cases is important because "such decrees often remain in place for extended periods of time, [and therefore] the likelihood of significant changes occurring during the life of the decree is increased." *Id.*

While we note that *Rufo* and *Heath* involved prison reform, we have found no indication, nor is there any reason to believe, that this type of case has somehow been set apart from other institutional reform litigation. Indeed, in *Rufo*, the Supreme Court cited an earlier school desegregation case, *Board of Education v. Dowell*, 111 S. Ct. 630 (1991), as supporting the rejection of the *Swift* "grievous wrong" standard and suggested generally that desegregation cases, beginning with *Brown v. Board of Education*, 347 U.S. 483 (1954), serve as a paradigm for other types of institutional reform litigation. 112 S. Ct. at 758; *see also Appeal of Little Rock School Dist.*, 949 F.2d 253 (8th Cir. 1991). Thus, although this circuit has never specifically applied the less stringent standards to a

consent decree entered in settlement of school desegregation litigation, we hold now that these decrees are subject to the same standards as enunciated in *Rufo* and *Heath*.[2]

Under the relaxed standard, modification of an institutional consent decree

> may be warranted when changed factual conditions make compliance with the decree substantially more onerous . . . when a decree proves to be unworkable because of unforeseen obstacles . . . or when enforcement of the decree without modification would be detrimental to the public interest . . . .

Rufo, 112 S. Ct. at 760. This circuit has announced a similar test to be applied in modifying institutional reform consent decrees:

> [T]he court need only identify a defect or deficiency in its original decree which impedes achieving its goal, either because experience has proven it less effective, disadvantageous, or because circumstances and conditions have changed which warrant fine-tuning the decree.

Heath, 888 F.2d at 1110. These standards, among other things, require the court "to balance the interest in preserving consent decrees entered into by agreement between private parties against the public interests sought to be achieved through modification of the decree." *Id.* The modification of an institutional consent decree will be upheld "if it furthers the original purpose of the decree in a more efficient way, without upsetting the basic agreement between the parties." *Id.*

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[2]We also note that the standard for modifying a consent decree is the same whether entered through the consent of the parties or after full and final adjudication of the merits at trial. *See Heath*, 888 F.2d at 1107 n.1 (citing *Swift*, 286 U.S. at 114).

With these basic principles of consent decree interpretation and modification in mind, we turn now to consideration of the specific issues presented by the district court's modification order.

IV.

We address, initially, a challenge to the district court's jurisdiction. The State of Ohio argues that "[t]he District Court lacked jurisdiction to expand the Consent Decree settling the LCSD desegregation case because there was never a finding of a constitutional violation on the part of [the State Department of Education]." We disagree. The consent decree states that it "shall remain in effect until the goals which are a part of the Decree have been achieved," and the State expressly agreed to "remain [a] part[y] to this action for purposes of enforcing this Decree and the plan adopted pursuant thereto." Moreover, a federal district court retains jurisdiction to modify a decree to adapt its terms to changed conditions, even where the decree was not litigated but instead entered by consent of the parties. *System Fed'n No. 91, Ry. Employes' Dep't v. Wright*, 364 U.S. 642, 650-51 (1961). We hold that the district court had jurisdiction over the parties and over Lorain's motion for an increase in the State's contributions to desegregation efforts.

The State's appeal in this case does not challenge the district court's authority to modify a consent decree generally nor question the proper standard for modification; it is concerned instead with the court's authority to modify the decree by substantially increasing the State's burden, over its objection and without any finding or acknowledgment that the State has violated the plaintiffs' constitutional rights. The consent decree is clear and unambiguous with respect to the State of Ohio's financial liability to Lorain. It states: "[T]he State of Ohio payments shall not exceed $ 1 million . . . or 50 percent of the actual reduction of racial isolation costs, whichever is less." This, of course, is an agreement by the State to pay $1 million, and no more. The parties to

the decree also "waived the need [for the district court] to make findings of fact and conclusions of law on all issues raised in the complaint" and agreed that "nothing in this Consent Decree shall be construed as an admission by any of the defendants of any violation of any provision of the Constitutions of the United States or the State of Ohio." The consent decree thus limits the obligations of the State to a sum certain and specifically provides that there is no adjudication or admission of constitutional violation by the State. In addition, there has been no judicial determination of the merits of plaintiffs' claims and no finding of constitutional violation by any of the defendants, including the State, at any stage of the litigation.

In fashioning and effectuating school desegregation decrees, federal courts are guided by equitable principles, and, traditionally, "equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown*, 349 U.S. at 300 (footnote omitted). It is well established, however, that in desegregation cases, as in all constitutional matters, the federal judicial power "may be exercised 'only on the basis of a constitutional violation . . . .'" *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)). As the Court stated in *Rufo*, 112 S. Ct. at 762, "Federal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated." In *United States v. Atlantic Ref. Co.*, 360 U.S. 19, 23 (1959), the Court observed that while a proposed interpretation of a consent decree might better effectuate the basic purposes of the statutes the government sought to enforce, "it does not warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues."

United States v. Michigan, 940 F.2d 143 (6th Cir. 1991), a prison reform case brought by the federal

government under the provisions of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997-1997j, addresses an issue similar to that presented here. In its complaint, the United States alleged, *inter alia*, that the State of Michigan had perpetuated conditions and practices constituting cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments of the United States Constitution, at three of its state prison facilities. A consent decree was entered in settlement of the litigation. Integral to the correction of the alleged constitutional violations at the prisons was the implementation of a plan for screening and classifying inmates. To this end, the State of Michigan agreed in the decree to design and implement certain classification measures to guide the proper assignment of inmates. *Id.* at 148. Among the numerous subsequent modification orders issued by the district court and reviewed in a consolidated appeal by this court was one involving the district court's "exten[sion of] the classification plan to prison facilities statewide, in derogation of the consent decree, which, by agreement of the parties, limited the application of the classification plan to the named institutions." *Id.* at 159. We reversed that portion of the district court's order, explaining:

> Conditions have not changed to such an extent that the trial court could look outside the four corners of the consent degree [sic] in determining the obligations of the parties. In addition, the record reveals no affirmative factual proof of constitutional violations to support this material extension and modification of the consent decree. Under the circumstances of this case, it is for Michigan to decide the feasibility of extending the professionally-based classification plan beyond the prisons named in the consent decree to prison facilities statewide.

Id.

In this case, too, we have been presented with a material extension of a defendant's duties and the question of the court's authority, in the absence of any finding of violation of plaintiffs' rights, to force these additional obligations on a defendant that has accepted limited liability through entry of a consent decree. By agreeing to the terms of the decree, the State of Ohio gave up "the possibility of prevailing on the merits in exchange for granting *certain limited affirmative relief* to plaintiffs," and, in return, plaintiffs "exchanged their right to obtain adjudicatory relief which would fully eliminate the effects of discrimination in the past as well as in the future." *Williams v. Vukovich*, 720 F.2d at 920 (emphasis added). We acknowledge that a party may possibly enter into a consent decree in order to save itself from a harsher result following litigation, yet at this stage of the litigation, we "ha[ve] no occasion to resolve the merits of the disputed issues or the factual underpinnings of the various legal theories advanced by the parties." *Id.*

In *Fox v. Department of Housing & Urban Dev.*, 680 F.2d 315 (3d Cir. 1982), the court stated:

> Although we do not doubt the power of a court to modify an injunctive order entered by consent, we think that in the usual case a court may not impose additional duties upon a defendant party to a consent decree without an adjudication or admission that the defendant violated the plaintiffs' legal rights reflected in the consent decree and that modification is essential to remedy the violation. . . . To impose additional duties under the decree . . . is to disregard the basic rights of litigants who waive their right to litigate defenses by consenting to have a decree entered against them. The conditions upon which rights are waived must be respected.

Id. at 323;[3] *see also Walker v. Department of Housing & Urban Dev.*, 912 F.2d 819 (5th Cir. 1990).

Lorain and the intervenor CHIP have offered several arguments to justify the district court's extension of the scope of the State of Ohio's financial liability.

CHIP argues that "[b]y agreeing to the consent decree in 1984, the State certainly conceded the existence of a pre-1984 constitutional violation." The argument implies that by agreeing to contribute up to $1 million to implementation of the Lorain desegregation plan, the State implicitly accepted responsibility for a constitutional violation. We disagree. The agreement of the parties plainly stated that "nothing in this Consent Decree shall be construed as an admission by any of the defendants of any violation of any provision of the Constitutions of the United States or the State of Ohio."

Lorain argues that the State of Ohio's liability for 50% of the costs of desegregation in Cleveland, Dayton, and Columbus based on an adjudication of the merits of the plaintiffs' claims, and its assumption of a $35 million obligation in Cincinnati without an adjudication of fault, are implicit acknowledgements of liability for a greater proportion of the costs of the Lorain integration program. We disagree. Here, unlike the Cleveland, Columbus, or Dayton cases, there has been no finding that the State has committed a constitutional violation, and unlike with Cincinnati, the State here agreed to pay only $1 million. While the Cincinnati case may be instructive as to the genesis of this liability cap, it does not in any way justify the judicial modification of the State's express and

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[3]In *Fox*, plaintiffs did not allege constitutional claims, but we see no reason to distinguish this case on the basis of the nature of plaintiffs' claims. In *United States v. Michigan*, 940 F.2d at 146, this court was confronted with allegations of Eighth and Fourteenth Amendment violations, yet our analysis of the court's authority to order extensions of the consent decree to reach the operation of facilities not contained in the decree did not vary on the basis of the allegations lodged against the defendant.

unambiguous promise to pay up to $1 million, and no more, toward implementation of the Lorain desegregation plan.

We also find it necessary to address the district court's statement, based on testimony at the modification hearing, that "Dr. [G. Robert] Bowers [a former State Department of Education official] felt that if the case went to trial the defendants would be found liable for discrimination." This declaration appears as close as the district court comes to an adjudication of a constitutional violation, yet, as a "finding of fact" it not only runs counter to the express provisions of the consent decree, but appears to improperly delve into the State's motivation for compromise and misstates the record. Dr. Bowers stated that, although the Lorain Board of Education likely had no defense to the allegations, he "was not of the opinion that the State should be in a defens[ive] posture in the Lorain case," unlike Cleveland, Dayton, and Columbus. The adjudications of constitutional violations by the State in Cleveland, Dayton, and Columbus cases are not only irrelevant to this case, but, according to Bowers, the State's role in those cities is also factually distinguishable from the Lorain case. The ultimate persuasiveness or veracity of Bowers' assertion is not important to this appeal, and we have no reason to express an opinion on either matter. We do note, however, that the State of Ohio has not, even in the evidentiary hearings on the issue of modification, admitted to any wrongdoing in Lorain.

Next, we reject the argument that the district court's failure to impose additional obligations on the State of Ohio would have effectively increased the burdens of the plaintiffs by jeopardizing the effective implementation of desegregation measures in Lorain. As the court stated in *Fox*, "[i]t is important to emphasize that the question for decision in this case is whether the consent decree should have been modified to impose a duty on the defendant that was not contained in it, and not . . . whether the defendant should be released from the obligations imposed by the decree." *Fox*, 680 F.2d at 322-23. In support of

its arguments for reversal of the modification order, the State of Ohio cites numerous cases involving prison reform for the proposition that relaxation of the burdens assumed by or imposed upon a defendant is the "typical" form of modification requested. Intervenor CHIP argues that this is a distinction without a difference, for "the State ignores the fact that the prisoners' burdens are increased when the population limits are relaxed." We think CHIP's assertion is mistaken. While we express no opinion on the question of what constitutes a typical modification request, we think it obvious that the law should assign great significance to whether a party seeking modification requests relaxation of the terms of consent decree or the imposition of additional burdens and obligations. For example, Fed. R. Civ. P. 60(b) allows for *relief* from the terms of a consent decree where the terms are no longer equitable. *See Rufo*, 112 S. Ct. at 757. There appears no comparable provision addressing a party's request for an increase in the burdens of a consent judgment.[4]

Finally, we do not dispute the district court's finding that full implementation of the Lorain desegregation plan has proved to be much more expensive than originally derived by the parties and approved by the court, and that the $2 million estimates relied upon by the parties through comparison to Cincinnati appear now "wholly unrealistic." But we note that the possibility that Lorain's costs would exceed $2 million was obviously foreseeable to, and taken into account by, the parties and the court in the consent decree. By explicitly arguing that the State's liability "shall not exceed $1 million . . . or 50 percent of the actual reduction of racial isolation costs, *whichever is less*," the parties who consented to the judgment, and the district court that entered it, clearly contemplated that the

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[4]We stress that the modification requested by the Lorain Board of Education is not necessarily the last word on the State of Ohio's liability, for the State may be ordered, pursuant to the district court's powers in equity, to pay a share of desegregation costs should the State at some point be *adjudicated* as having violated the constitutional rights.

costs of desegregation measures in Lorain might prove to be more expensive than anticipated (emphasis added). While we do not doubt that the infusion of an additional $9 million in state funding would ease considerably Lorain's plight in achieving the requirements of the desegregation plan, we conclude that the modification ordered in this case stands contrary to, and effectively eviscerates, the terms of the State's consent from which the district court derived its authority to enter the consent judgment.

We hold that a district court may not, in the name of modification, circumvent the express terms of a defendant party's consent in the absence of an adjudicated or admitted violation of law. In the absence of an adjudication or admission of constitutional violation, the district court's authority to impose additional obligations on a defendant is constrained by the terms of agreement entered by the parties to the consent decree.

Nothing in this opinion vitiates either the goals of the desegregation consent decree or the integrity of the Lorain Board of Education's commitment to achieve them. Rather, our decision merely enforces the agreement reached by the defendants concerning their respective obligations--an agreement entered into and approved without an adjudication of the merits of the plaintiffs' allegations. We are sympathetic to the plight of Lorain's educators and administrators, faced with virtually limitless claims upon their very limited educational resources, and, most importantly, to the plight of its students, forced to endure many of the resulting hardships. However, none of the parties has provided authority, nor have we been able to discover any, to support the contention that, absent an adjudication of constitutional violation, the State of Ohio is legally obliged, or may be judicially ordered over its objection, to increase its share of the costs of desegregation beyond the $1 million limitation establishing the terms and scope of its consent.

Lacking an adequate legal and factual foundation for ordering the specific modification requested by the Board, the district court's order increasing the State's financial obligations under the consent decree beyond $1 million constitutes an abuse of discretion and cannot stand.[5]

V.

The district court's judgment of June 21, 1991, eliminating the express limitations placed on the State of Ohio's financial liability by consent of the parties and increasing the State's obligations over its objection and in the absence of any adjudication or admission of violation of plaintiffs' constitutional rights, is hereby **REVERSED**, and this case **REMANDED** for further proceedings in accordance with this opinion.

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[5]In addition to the issues already addressed, the State contends that the district court's order violated the Eleventh Amendment and that the district court erred in calculating the costs of the desegregation plan, assessing interest on the State's payments to Lorain, and ordering the State to pay the attorneys' fees incurred by the Board and CHIP in prosecuting the motion to increase the State's contribution. In their cross-appeal, the Board and CHIP, argue that the district court erred in reducing the State's share of desegregation costs to levels below 50% in the school years 1990-91 to 1993-94. Our disposition of this case makes it unnecessary to reach these issues.

OPINION OF THE UNITED STATES DISTRICT COURT

(Filed June 21, 1991)

No. C79-1775

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LORAIN NAACP, *et al.*,
Plaintiffs,

v.

LORAIN BOARD OF EDUCATION, *et al.*,
Defendants.

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768 F. Supp. 1224

[1224] City Board of Education filed motion for order requiring the state of Ohio to [1225] increase its funding to cover costs of implementing and completing desegregation plan contained in consent decree. The District Court, Dowd, J., held that modification of consent decree requiring the state to increase its share of the costs of implementing and completing desegregation plan was warranted, in view of evidence that desegregation program using magnet schools and calling for development and expansion of bilingual program was more costly than originally contemplated.

Motion granted.

1. **Federal Civil Procedure 2397.6**

Trial court always has continuing jurisdiction to enforce a consent decree as written.

2. **Federal Civil Procedure 2397.4**

To modify consent decree in the area of institutional litigation, court need only identify defect or deficiency in its original decree which impedes achieving its goal, either because experience has proven it less effective, disadvantageous, or because circumstances and conditions have changed which warrant fine-tuning the decree.

3. **Federal Civil Procedure 2397.4**

Modification of consent decree requiring the state of Ohio to increase its share of the costs of implementing and completing desegregation plan for the city was warranted, in view of evidence that desegregation program using magnet schools and calling for development and expansion of bilingual program was more costly than originally contemplated.

Thomas I. Atkins, Brooklyn, N.Y., James L. Hardiman, Cleveland, Ohio, David W. Whitaker, Jr., Ph.D., Beachwood, Ohio, Grover G. Hankins, Asst. Gen. Counsel, NAACP, Baltimore, Md., Ronald J. Ruskan, Lorain, Ohio, for plaintiffs.

Anthony B. Giardini, Bradley & Giardini Co., LPA, Lorain, Ohio, Rita Eppler, Richard W. Ross, Asst. Atty. Gen., Federal Litigation Section, Columbus, Ohio, for defendants.

MEMORANDUM OPINION

DOWD, *District Judge*

I. INTRODUCTION

Before the Court in the above-captioned case[1] is the issue of what amount of additional funding defendant the Board of Education of the State of Ohio ("State") should be required to contribute to the desegregation program in the Lorain City Schools. On January 29, 1990, defendant the Lorain Board of Education ("Lorain") filed a motion for an order requiring defendant the State to increase its share of the costs of implementing and completing the Desegregation Plan stemming out of the Consent Decree entered in this case, (Docket No. 279). The State filed a memorandum in opposition to Lorain's motion in which the State argued that the Consent

[1] This case was initially filed on September 13, 1979, and was assigned to Judge Robert Krupansky. The plaintiffs brought the action on behalf of themselves and as representatives of a class of persons consisting of all minority persons who reside in the Lorain City School District, against the Lorain Board of Education and the Board of Education of the State of Ohio, and all other individual defendants. Plaintiffs' complaint alleged that the defendants engaged in a pattern or practice of discrimination against Blacks and Hispanics by closing certain school facilities, by the way in which Lorain assigned students, and by methods of hiring and methods of assigning teachers and administrators.

The case was transferred to Judge Ann Aldrich on May 21, 1980, and to Judge Alvin Krenzler on December 30, 1981. On December 21, 1982, the case was transferred to the docket of this Court.

The Court proceeded to set the case for trial. The Court subsequently was put on notice that the parties were attempting to settle the case. In an Order dated February 24, 1984, (Docket No. 46), the Court ordered the parties to lodge the Consent Decree with the Court for the Court's approval. The Court preliminarily approved the Consent Decree on May 15, 1984, (Docket No. 62), and later held a hearing to determine whether the Consent Decree should be approved as fair, adequate and reasonable. The Court approved the Consent Decree on August 13, 1984, (Docket No. 76).

Decree is a contract which was negotiated at arms length and as such is not modifiable except in certain specified exceptional circumstances. The State argued that Lorain can [1226] not demonstrate that modification of the Consent Decree is warranted in the present case.

In an Order dated May 24, 1990, (Docket No. 307), the Court denied Lorain's motion to modify the Consent Decree with respect to increased State funding. Lorain subsequently filed a motion for reconsideration of the Court's March 24, 1990 Order denying Lorain's motion for a modification of the Consent Decree, (Docket No. 309). Lorain argued in its motion that if the Court does not modify the Consent Decree and increase the State's contribution to the Desegregation Plan, then the goals of the Consent Decree will not be met. The State filed a memorandum in opposition to Lorain's motion for reconsideration on June 25, 1990, (Docket No. 314), in which the State asserted the same arguments as were presented in its original opposition motion and requested that the Court deny the motion for reconsideration.

Following the filing of the motion for reconsideration, the Court conducted an evidentiary hearing on the matter on July 25, 1990. The Court then gave the parties the opportunity to file post-hearing briefs on the merits of Lorain's motion for an order requiring the State to increase its contribution to the Desegregation Plan. After considering the evidence before it and the legal arguments presented, the Court reconsidered its prior ruling and issued an Order on August 17, 1990 in which it found that the Consent Decree should be modified by an increase in the State's contribution to the Lorain Desegregation Plan.[2] The

[2] The legal analysis upon which the Court's opinion rested will be presented in full and expanded upon in the present Memorandum Opinion.

Court declined to arrive at a particular dollar figure which the State would be required to contribute in its August 17, 1990 Order. Instead, the Court instructed the parties to engage in negotiations in an effort toward arriving at the amount of additional State funding.

Following the issuance of the August 17, 1990 Order, the State filed a motion asking for a clarification of whether or not the Court's August 17, 1990 Order is a final appealable order, (Docket No. 338). On September 12, 1990, the Court responded by indicating that, in the Court's view, the August 17, 1990 Order is not a final appealable order since the Order merely indicated an intention to modify the Consent Decree and encouraged the parties to enter into negotiations regarding an increase in funding but did not order the State to pay a particular dollar amount, (Docket No. 339). The Court indicated, however, that in the event negotiations proved fruitless, then the Court would make a definitive determination with regard to the increased State funding, and, at that point, there would be a final order for purposes of appeal.

The Court was under the impression following the issuance of its August 17, 1990 Order that the parties were indeed engaging in meaningful negotiations toward arriving at a solution for the funding problem. The Court has since discovered that the negotiation process was far from successful. The State has from the inception of this controversy taken the position that it should not be required to contribute *any* additional funds to the Lorain desegregation program. The State has agreed on various occasions to provide "technical assistance" to Lorain. The State continues to maintain, however, that the ceiling amount which it was required to pay under the

Consent Decree, i.e., $1,000,000.00, has been paid by the State and its obligation under the terms of the Consent Decree has been fully complied with.

In February of 1991, the Court became convinced that the negotiation process could not solve the present controversy. Accordingly, the Court convened the parties for a status conference at which the Court discussed a myriad of issues relating to the Lorain City School District. The Court discussed, *inter alia*, the status of the magnet schools in place in Lorain, the operation of the bilingual program in place in Lorain, and, the extent to which Lorain has been attempting to or has met the hiring goals as set forth in the Consent Decree. The Court also indicated to the parties that it would conduct an extensive [1227] evidentiary hearing for the purpose of determining the precise amount which the State should be ordered to contribute to the desegregation program in Lorain. The Court indicated that facts regarding Lorain's financial situation, the operation of the magnet schools in Lorain, the operation of the bilingual program in Lorain, the efforts at achieving the hiring goals set forth in the Consent Decree, as well as the facts surrounding the entrance into the Consent Decree by the parties in the above-captioned case would need to be addressed in the evidentiary hearing.

The Court then conducted an exhaustive evidentiary hearing on various days over a period of weeks beginning on April 12, 1991. The Court sets forth below in its opinion its findings of facts based on the testimony offered in the hearing held on April 12 and 24, 1991 and May 6 and 10, 1991.

II. THE CONSENT DECREE.

The Consent Decree[3] entered by the parties to this case provides that:

> [i]mmediately upon the journalization of this Decree the Lorain Board of Education will begin to develop a plan by which the objectives outlined in the Goal Statement will be achieved . . .

Consent Decree, Docket No. 76 at 2. The Consent Decree further provides that in the event the parties are unable to arrive on an approved plan within a specified number of days, then any party can petition the Court for the Court's intervention. *Id.* at 2-3. The Consent Decree sets forth the time at which the plan is to go into effect, and provides that the plan should consist of the creation of a seven member Board of Review to oversee the implementation of the plan approved by the Court. With respect to the funding of the Lorain desegregation plan, the Consent Decree provides that:

> The State of Ohio will pay to the Lorain City School District 50 percent of the expenses incurred by the Lorain City School District in designing, implementing, administering and maintaining educationally sound programs reasonably expected to reduce racial isolation to the standards defined in the Goal Statement. The State of Ohio will pay 50 percent of the unreimbursed expenses attributed to the transportation of students who are being transported for the reduction of racial isolation. "Unreimbursed expenses" shall mean the portion of this expense which remains after deducting the state transportation reimbursement applicable to students involved in such transportation.

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[3] The Court will attach the Consent Decree as Appendix A of its Memorandum Opinion, but will reproduce pertinent sections within the body of its Opinion as well.* **

* [Editor's note: Appendices A-F referred to in footnotes 3, 12 and 14-17 are not included for publication.]

** [Petitioners' note: The Consent Decree is included in the Appendix at A77.]

> The total of the expenses referred to above shall be limited to those incurred during the seven school years 1984-85 through 1990-91, and the State of Ohio payments shall not exceed $1 million during the seven year term, or 50 percent of the actual reduction of racial isolation costs, whichever is less.

Id. at 4-5.

The Consent Decree provides that "[t]his consent decree shall remain in effect until the goals which are a part of the decree have been achieved whereupon this decree shall expire." *Id.* at 5.

The Consent Decree also includes a section titled "Goal Statement" in which various goals sought to be achieved through implementation of a desegregation plan are set forth. The Consent Decree sets forth the following educational goals:

> 1. Eliminate racially identifiable schools, caused by student and/or teacher assignments, consistent with other goals of this Goal Statement.
>
> 2. Assign students to school attendance areas so that each school will establish a composite minority student ratio of no more than a deviation of +20 or -15 percent from the District Average percentage of each identifiable minority's student racial composition.
>
> [1228] 3. The parties agree that the Lorain City School District shall retain an independent contractor to evaluate the bilingual programs currently in effect to determine program effectiveness. The cost of such evaluation shall be considered part of the cost of implementation of the Consent Decree and up to 50 percent of the cost shall be reimbursed by the State of Ohio as provided in Item No. 4 of the Consent Decree . . .

> 4. Provide a mechanism by means of which students may transfer from their school of assignment to other schools, provided that the transfer does not adversely affect the racial composition of the sending or receiving school.
>
> 5. Assure that any student assignments or reassignments required to comply with the goals of this Decree will be carried out in a manner which equitably allocates the burdens on the students. Assure that any school closings which are necessary to comply with the terms of this Decree are carried out in a manner which equitably allocates the burden of such closings on the various neighborhoods of the City.
>
> 6. Student reassignments necessary to establish and maintain the percentages of non-white students in each building at the +20 or -15 percent level will be implemented in a manner that will ensure that whatever "burden" of movement there may be will be equitably shared by both non-white and white students. If any additional schools are closed, students from those schools shall be reassigned in a manner that ensures that each receiving school will have a composite minority student ratio of no more than a deviation of +20 or -15 percent from the district average percentage or [sic] minority students . . .

Id. at 7-9 (emphasis added).

With respect to bilingual education in the Lorain City Schools, the Goal Statement provides that "the Lorain City School District shall retain an independent contractor to evaluate the bilingual programs currently in effect and to determine program effectiveness." *Id.* at 7. The Consent Decree further provides that the Lorain Board shall:

> Eliminate program shortcomings discovered in the evaluation process and implement modifications.

(a) Maintain bilingual programs for Hispanic students.

(b) Comply with both federal and state bilingual statutes . . .

(c) Assign non-, or limited-, English proficient students only to schools which are adequately staffed and equipped to meet their diagnosed lingual needs.

Id. at 8.

The Goal Statement portion of the Consent Decree also sets forth the affirmative action which should be taken with respect to employment opportunities in the Lorain City School District. Specifically, the Goal Statement indicates that particular hiring goals should be put in place. The Goal Statement of the Consent Decree provides in this respect that:

1. The HIRING GOAL shall be minority/majority ratio of the adult population in Lorain in the year of achievement.

2. The same goal shall apply to both Certificate and non-Certificated personnel at each level of responsibility within the school system.

3. The HIRING RATE for certificated teaching staff during the 1984-85 school year shall be 20% Black and 20% Hispanic. Provided, however, that the parties recognize that the Lorain District shall have an opportunity to demonstrate impossibility of achieving the Hispanic goal for reasons unrelated to good faith effort.

4. The HIRING RATE for certificated staff for all subsequent years shall be determined by the District, in light of the pertinent factors (number of vacancies, areas in which staff is needed, availability of qualified applicants, etc.)

5. The hiring rate for non-certificated staff shall be determined by the Dis-[1229]trict, in light of such pertinent factors as are set forth in #4 above.

6. The Lorain District shall have five years during which to achieve the hiring goal as it relates to Blacks and seven years as it relates to Hispanics.

Id. at 13-14.

Following lodging with and acceptance by the Court of the Consent Decree, the parties began developing a desegregation plan to implement the goals of the Consent Decree.

III. THE DESEGREGATION PLAN.

A. *Formulation of the Plan.*

The parties attempted but were unable to reach an agreement on a plan which could be utilized to achieve the objectives of the Goal Statement as set forth in the Consent Decree. A significant dispute between the parties centered on Lorain's proposal to implement a magnet school program rather than employ a program of involuntary reassignment to bring the Lorain schools into compliance with the +20/-15 ratio as to minority students as required by the Consent Decree. Plaintiffs wanted to implement a system of involuntary reassignment of students. Plaintiffs contended, *inter alia*, that a system of involuntary reassignment would be more efficient at achieving desegregation and would be less costly.

Finding that the parties were having difficulty agreeing on a desegregation plan, the Court elected to hold a hearing on the proposed desegregation plan. The Court began the evidentiary hearing on the matter on

January 22, 1985. The Court then discovered that the parties were attempting to negotiate a resolution and so continued the hearing until March 6, 1985.

At the March 6, 1985 hearing, the Court received testimony and evidence on the proposed plan and heard arguments on the issues raised by the plaintiffs. The Court then issued a Memorandum Opinion and Order, (Docket No. 95), on April 1, 1985 both approving portions of the proposed plan and rejecting other portions of the proposed plan as is outlined below.[4]

The court approved the Lorain Board of Education's proposed desegregation plan regarding the use of a magnet program to be put into effect at two schools for the 1985/86 school year. The Court rejected, however, the definition of success of the magnet program that was provided in Lorain's proposed plan[5] and held, instead,

[4] The Court noted in its April 1, 1985 Opinion that although the plaintiffs recognized that the Lorain Board of Education had made a good faith effort to comply with the requirements of the Consent Decree through its proposed desegregation plan, the plaintiffs still voiced the following objections to the proposed plan:

> 1. The proposed use of magnet schools in the 1985/86 school year, as opposed to involuntary reassignment to reach the desegregation goal is inconsistent with the consent decree;
> 2. A stringent review is necessary of the procedures regarding the discipline of students considering that a disproportionate number of black students have been suspended from the Lorain city schools;
> 3. The Lorain Board of Education is not making a good faith attempt to achieve the goals of hiring minority teachers and staff employees for the school district;
> 4. The board of review which is to be created pursuant to the consent decree is not given sufficient power to monitor the implementation of a desegregation plan.

Id.

[5] Lorain had indicated in its proposed plan that success with regard to racial balance of students would be achieved if the program attained 60% of the critical target.

that the magnet program would only be deemed successful for the 1985/86 school year if the plan *achieved* the targeted ratios as set forth in the consent decree and not some lesser percentage.

The Court also approved Lorain's proposed plan as it related to enhancement and implementation of a bilingual program. The Court noted:

> The bilingual program is of extreme importance to the Hispanic students of the Lorain School District. The Lorain School District is composed of approximately 22.8% Hispanic students. However, the majority of the Hispanic students are located in the south Lorain schools. The bilingual program is currently in effect in the south Lorain schools. The proposed plan provides for [1230] an extensive process by which the bilingual program currently in effect will be evaluated with the help of independent consultants. The Board of Education proposes an evaluation team submit a final report and recommendation regarding the bilingual program by May 20, 1985. The magnet program will not affect the south Lorain schools in the 1985/86 school year. The board of education asserts that postponing the desegregation process in south Lorain schools for the 1985/86 school year will allow the implementation of changes and recommendations regarding the bilingual program prior to the involuntary transfer of students. The board of education asserts that time is needed time [sic] to implement the upgraded bilingual program and the board does not want to involuntarily transfer students out of the south Lorain schools who may need the use of such a program.

Memorandum Opinion and Order, Docket No. 95 at 10-11.

The Court adopted the proposed plan with regard to the hiring of certificated and noncertificated personnel as well. The Consent Decree, as was indicated above, provides that the hiring goal for the Lorain City School District shall be the minority/majority ratio of the adult population in Lorain in the year of achievement. The Consent Decree further provides that the same goals shall apply to both certificated and noncertificated personnel at each level of responsibility within the school system. Likewise, the Consent Decree provides that the Lorain City School District shall have five years during which to achieve the hiring goals as to Blacks, and seven years as to Hispanics.

The Court found in its Memorandum Opinion and Order of April 1, 1985 that "the Lorain School District is making a good faith effort to reach the goals of the Consent Decree, i.e., having a minority/majority ratio for the teachers and staff of the Lorain City Schools which mirrors the adult population in Lorain and attaining such a goal in five years as it relates to Black teachers and seven years as it relates to Hispanic teachers." Accordingly, the Court accepted the provisions of the proposed plan as they related to achieving the hiring goals as provided in the Consent Decree. However, the Court noted that:

> [t]o insure a continued good faith effort, the school district is to provide the Court with semi-annual reports regarding the efforts to attain the hiring goals of the Consent Decree. The School District is to provide the Court with a report prior to conducting teacher and staff recruiting for the following academic year period. The report is to thoroughly explain the method and extent of the recruitment and hiring expected for the following academic year. The second semi-annual report is to

> be presented to the Court following the completion of recruiting and hiring for an academic year. The second semi-annual report is to inform the Court of the actual recruiting techniques utilized and the result of such recruiting, with particular emphasis on minority and nonminority hiring.

Id. at 20. The Court noted further that "[s]uch reports will enable the Court to monitor the progress of the school district in attaining the hiring goals during the time period provided under the Consent Decree. Upon motion by any party, or on the Court's own motion, a hearing will be held regarding the school district's efforts to comply with the hiring goals in the Consent Decree." *Id.*

Following the adoption and the initial implementation of the Lorain desegregation plan, the Court continued to closely oversee the implementation of the desegregation plan and to assure that Lorain was meeting the requirements of the Consent Decree. The Court required that progress reports be submitted for the Court's review.[6]

The Court now moves on to make findings of fact regarding the implementation of the desegregation plan. The Court focuses specifically on the three following [1231] areas: 1.) the Composition of the student population in the Lorain City School District; 2.) the Bilingual Program, and 3.) the Hiring Goals.

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[6] A review of the extensive docket in this case evidences the Court's continued involvement in the implementation of the desegregation program in Lorain.

B. *Implementation of the Plan.*

1. Composition of Student Population in Schools.

1. The Goal Statement of the Consent Decree entered in the above-captioned case provides that Lorain shall eliminate racially identifiable schools and that Lorain shall assign students to school attendance areas so that each school will establish a composite minority student ratio of no more than a deviation of +20 or -15 percent from the district average percentage of each identifiable minority's student racial composition. Consent Decree, Docket No. 76 at 7.

2. At the time the Consent Decree was entered into in the above-captioned case, six schools, Fairhome Elementary School, Hawthorne/Boone Elementary School, Lincoln Elementary School, Lowell Elementary School, Whittier Junior High School, and Southview High School, were out of compliance with the terms of the Consent Decree with respect to the composition of the minority student population. Transcript, Docket No. 401 at 594-95.

3. Former Superintendent of the Lorain City School District, John Pavic, originated the idea of utilizing magnet school programs as a means of coming into compliance with the terms of the Consent Decree. Transcript, Docket No. 394 at 481. Lorain proposed the use of a magnet school program as a method to achieve the student population ratios set forth in the Consent Decree. Lorain began with magnet programs in two of the buildings which were out of compliance, Fairhome Elementary School and Hawthorne/Boone Elementary, for the 1985-86 school year. Transcript, Docket No. 399 at 14. The magnet programs in these buildings proved

successful. Accordingly, the Lorain magnet programs were expanded into other buildings to bring all schools into compliance with the student population ratios in the Consent Decree.

4. At present, all twenty-one buildings in the Lorain City School District are racially balanced within the limits outlined in the Consent Decree. Transcript, Docket No. 399 at 16.

5. At the time the parties entered into the Consent Decree in the above-captioned case and formulated the desegregation plan for achieving the goals of the Consent Decree, it was thought that it would be necessary to move approximately 650 students to achieve the requisite racial composition of the student population. Transcript, Docket No. 394 at 413. However, when Lorain actually began implementing its magnet desegregation program, it was discovered that Lorain in fact had to move in excess of 1200 students to maintain a viable desegregation program.[7] Lorain discovered that the movement of the bare minimum number of students to come into compliance with the terms of the Consent Decree would not result in long-term compliance in that if Lorain only moved the minimum number of students and one or two students left a particular school building, then the building would fluctuate in and out of compliance very frequently. Transcript, Docket No. 394 at 414; Transcript, Docket No. 401 at 599-600. The Court finds that Lorain needed to move more than the 650 students in order to have a viable long-term desegregation plan.

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[7] The Court notes that different figures were provided to the Court as to the precise number of students needed to be moved to achieve the requisite racial composition in the school district. Clearly, however, at least twice as many students needed to be moved than was originally envisioned would need to be moved under the Consent Decree.

6. The original 650 number arrived at did not include students who needed to be moved for the purpose of bilingual education in the Lorain City School District. Transcript, Docket No. 401 at 600.

7. Lorain has expanded its magnet school program beyond the magnet programs *necessary* to achieve the goals of the Consent Decree in the above-captioned case.[8] Seventeen out of twenty-one schools [1232] in Lorain currently have magnet programs. Transcript, Docket No. 401 at 645-46. The additional magnet programs in place in the Lorain City School District help Lorain to maintain desegregation in its school district but are not necessary for Lorain to maintain compliance with the terms of the Consent Decree with respect to composition of student population.[9] *Id.* at 615.

8. There are approximately 1300-1350 students involved in magnet programs necessary to remain in compliance with the terms of the consent decree, and approximately 2000 to 2200 students involved in the non-court ordered magnet programs.[10] Transcript, Docket No. 401 at 647. There are approximately 3500 students involved in magnet programs in Lorain out of a total student population in the District of about 12,300 students. Transcript, Docket No. 399 at 22; Transcript, Docket No. 401 at 648.

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[8] The Court will refer to the magnet programs necessary to comply with the terms of the Consent Decree as court ordered magnets, and the additional magnet programs in place in Lorain as non-court ordered magnets.

[9] The Court has been provided with separate figures for the costs of court ordered versus non-court ordered magnets.

[10] As the Court noted in footnote 7 above, there was some variance in the figures provided to the Court as to the numbers of students participating in magnet programs.

9. As is outlined below, the Palm Academy building is out of compliance with the racial balance set forth in the Consent Decree since it houses a large component of the bilingual program and necessarily has a high concentration of Hispanic students. However, the Court has given its approval for the bilingual program at Palm Academy to operate even though it results in an otherwise impermissible concentration of Hispanic students in one school building.[11]

2. The Bilingual Program.

1. The plaintiffs have taken the position since the inception of this litigation that they adequately represent all minority students in the Lorain City School District. However, it became apparent to the Court that the Hispanic students in the Lorain City School District and their parents believed that they were entitled to separate counsel to adequately represent their interests. The Court found that the Hispanics in Lorain are particularly concerned about the hiring of Hispanic individuals. Additionally, the Court found that the Hispanics are committed to the continuance and further development of an adequate bilingual program in the Lorain City School District and this interest in the bilingual program led to tension between counsel for plaintiffs and the Hispanics. Accordingly, on April 11, 1989, the Court recognized the Coalition for Hispanic Issues and Progress ("CHIP") as an intervening party and appointed Mr. Jose Feliciano of Baker & Hostetler to represent CHIP, (Docket No. 252). Since that date, the Hispanic interests have enjoyed separate representation.

2. The Consent Decree provides that the Lorain City School District shall retain an independent contractor to evaluate the bilingual programs currently

[11] *See*, Order, Docket No. 306.

in effect in Lorain to determine the effectiveness of said programs and shall also eliminate program shortcomings that may be discovered in the evaluation process and implement modifications. Consent Decree, Docket No. 76 at 7-8.

3. The evidence revealed that at the time the Consent Decree was entered, Lorain did have some bilingual education programs in place; however, Lorain did not have a core bilingual program in place and the programs that were in place were not meeting the special needs of Lorain's Hispanic student population. Transcript, Docket No. 401 at 691-93. That is, Lorain did not have a program in place which was effective at keeping language deficient students in school and mainstreaming such students into the regular student body.

4. Pursuant to the terms of the Consent Decree, an evaluation of Lorain's bilingual education program was conducted and the results lodged with the Court on August 9, 1985, (Docket No. 107).

5. After the evaluation of the bilingual program was conducted, Lorain developed a core bilingual program to meet the needs [1233] of the Lorain City School District's language deficient students. Transcript, Docket No. 303 at 5. The bilingual program put in place is located in four different school buildings throughout the Lorain City School District. Each school houses a different component of the bilingual education program. The focus in the program is to provide students with effective English language instruction.

6. In the 1986-87 school year, Lorain reopened the Palm Academy school building which was closed at the time of the entrance into the Consent Decree. The Palm

Academy building was reopened because Lorain needed a place to house the component of its bilingual program which involves the instruction of students who do not have any English-speaking skills. The component of the bilingual program housed at the Palm Academy school contains students grades kindergarten through sixth who need instruction in Spanish because they do not speak any English. Transcript, Docket No. 303 at 5. Palm Academy houses students who need extensive instruction in both their native language and in English. The bilingual program at Palm Academy uses a child's first language as an interim medium of instruction until the child acquires fluency in the second language. Status Report, Docket No. 358 at 10.[12]

7. Recognizing that by housing a major component of the bilingual program at the Palm Academy building, the building would necessarily be out of compliance with the percentages mandated by the Consent Decree, Lorain opened a magnet program in the Palm Academy building. The magnet program in the Palm Academy building is a Montessori program involving Caucasian, Black, and Hispanic students. Transcript, Docket No. 303 at 5-6.

8. The Court finds that bilingual programs in general are race selective in that in order to be successful, such programs involve a high concentration of, for instance, Hispanic students in one location.

9. In an Order dated April 11, 1990, (Docket No. 306), the Court modified the Consent Decree so as to exempt Palm Academy from the requisite racial balance of the Consent Decree only to the extent that the racial

[12] The Court has attached as Appendix B to its Opinion the Status Report on Desegregation of the Lorain City Schools issued on January 29, 1991.

imbalance is caused by the presence of the bilingual program at Palm Academy. The Court ordered that all other programs at Palm Academy except for the component of the bilingual program must remain in compliance with the racial balance stipulated to in the Consent Decree. The Montessori Program at Palm Academy is racially balanced. Transcript, Docket No. 303 at 6.

10. The other components of the bilingual program other than that located at Palm Academy are located at Meister Elementary School, Longfellow Junior High School, and Southview High School. The component of the bilingual program at Meister Elementary School includes students who already have some degree of English proficiency but not enough to function successfully in the mainstream classroom. The program at Meister continues to develop the English language skills which the students already have. The native languge is used only for checking comprehension and/or tutoring as needed. Grades kindergarten through second are in self-contained classrooms with a bilingual teacher and a bilingual teacher aide. Grades three through six are organized as a pull-out English as a Second Language ("ESL") program. Students in grades three through six at Meister follow the regular schedule of the mainstream classroom with some modifications.

A high intensity language training center for grades seven through eight is offered at both Longfellow Middle School and Southview High School. This program is for students who are identified as monolingual speakers of a language other than English or as limited English-proficient students. Bilingual teachers and bilingual teacher aides work with the students in the ESL

classroom. Students are mainstreamed in regular classrooms for many [1234] subjects. Status Report, Docket No. 358 at 11.

11. The Court finds that Lorain's bilingual program has been successful in terms of meeting the needs of language deficient students in the Lorain City School District. Lorain has been successful in mainstreaming bilingual students. The overall test scores of bilingual students have improved as a result of the implementation of the bilingual program as it now exists in Lorain. In the 1990-91 school year, thirteen students from the bilingual program will graduate in Lorain. Transcript, Docket No. 401 at 611. Prior to the implementation of a cohesive core bilingual program, Lorain had difficulty keeping bilingual students in school.

3. Hiring Goals.

1. The Goal Statement of the Consent Decree provides that the hiring goal in place in the Lorain City School District shall be the minority/majority ratio of the adult population in Lorain in the year of achievement. The Consent Decree further provides that the Lorain City School District shall have five years during which to achieve the hiring goal as it relates to Blacks and seven years as it relates to Hispanics. Consent Decree, Docket No. 76 at 13-14.

2. Lorain's affirmative action goal in terms of hiring pursuant to the Consent Decree is 12% Black and 14% Hispanic since these are the percentages of adult minorities in the population of the City of Lorain.

3. The Lorain City School District has submitted to the Court annual status reports on its progress under the desegregation plan in place in Lorain. In its most recent

report filed with the Court on February 4, 1991, (Docket No. 358), Lorain provided the Court with a report on the progress of the Lorain City School District in meeting its affirmative action goals. The report indicates that Lorain has not as yet met its hiring goals under the Consent Decree. The recent status report indicates that as of December 31, 1990, Lorain had 873 professional employees of which 86, or 9.9%, were Black and 38, or 7.8% were Hispanic; Lorain had 632 classified employees of which 91, or 14.4% were Black and 106, or 16.8% were Hispanic. Status Report, Docket No. 358.[13]

4. The Court finds that Lorain has made a continuous and good faith effort toward achieving the hiring goals in the Consent Decree. In a hearing conducted on February 20, 1987, the Court heard testimony regarding the efforts Lorain had made up to that point toward achieving the hiring goals in the Consent Decree. The testimony revealed that Lorain advertised for positions at many colleges and universities. Lorain sent vacancy notices to the colleges and universities and sent a monthly posting to the Minority Affairs Office of the colleges and universities. Lorain flew in or paid for the transportation costs of any minority applicants who were willing to travel to Lorain for interviews. Lorain also became a part of the Ohio Minority Recruitment Consortium which is a group of about sixteen to eighteen school districts in Ohio that have an active commitment to minority recruitment. Lorain also trained its recruiters. Transcript, Docket No. 174 at 22-24.

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[13] The Court notes that Lorain is progressing toward achievement of its hiring goals. At the point at which Lorain achieves the hiring goals, it now appears that the Court's supervision over the Lorain City School District will be complete.

5. Lorain indicated in its most recent status report to the Court that it employed the following recruitment procedures during the 1990-91 school year. Lorain had an "open interview" practice until the staffing for the 1990-91 school year was completed. Under the "open interview" practice, a teacher applicant was granted an immediate interview by the School District's personnel office. Advertisements announcing the "open interview" practice were placed in the Sunday editions of both the *Plain Dealer* and the *Akron Beacon Journal* through August of 1990. The Personnel Office in Lorain continued to conduct interviews when employment vacancies occurred. When vacancies occurred during the school year, minority applicants whose [1235] names were pulled from the data bank maintained by Lorain's Personnel Office were contacted.

Lorain still reimburses minority applicants for travel expenses if they come from out of state to interview. Professional staff of the Lorain City Schools continue to interview teacher candidates both at colleges within Ohio and in locations outside of Ohio where there are significant numbers of minority teaching candidates. The staff members participating in the recruitment efforts are provided with training. Lorain has continued its participation in the Ohio Minority Recruitment Consortium. Likewise, Lorain advertised for positions in the *Black Employment Education Journal* and the Spanish language newspaper *El Dia Nuevo.*

Lorain has established contacts with the Lorain NAACP and Centro de Servicios Sociales Para La Communidad Hispana to develop procedures to welcome minority applicants to the Lorain community. Likewise, Lorain has entered into discussions with representatives of these community organizations to find ways to recruit

more minority persons into the Lorain community. Lorain has also developed plans to target recruitment efforts for the 1991-92 school year in urban areas where large numbers of minority teachers are employed.

6. Lorain has made a continued and good faith effort at achieving the hiring goals. Lorain's inability to achieve the hiring goals set forth in the Consent Decree has not been a result of any delinquency or inaction on the part of Lorain. Instead, Lorain's inability to meet the hiring goals has been a result in great part to several factors outside of Lorain's control. One major factor is Lorain's inability to compete with school systems with more competitive salaries. A second factor is the location of the Lorain City School District. The Court finds that it is difficult to interest out of state applicants into coming to Lorain, Ohio, especially when salaries are not highly competitive. Third, the Court finds that it is difficult to find minority applicants to fill certificated positions when the need arises.

IV. THE GROWING FINANCIAL CRISIS IN THE LORAIN CITY SCHOOLS.

1. In an application for federal grant money for its magnet programs dated November 6, 1986, Lorain indicated that an independent audit which had just been performed revealed that of the $2,000,000 pool for the Lorain desegregation plan, $600,000, or 30% of the total amount designated for a seven year period, was utilized during the period of August 1984 to December 1985. Ohio Department of Education, Hearing Exhibit 11 at 26-27. Lorain indicated that this amount of money was spent when the transportation costs for the magnet programs were relatively minimal in that only two magnets were in place in 14 classrooms impacting 300 students.

2. The total cost for Lorain's court ordered magnet programs for the 1989-90 school year was $5,201,834.00.[14] The estimated total cost for Lorain's court-ordered magnet programs for the 1990-91 school year is $5,446,353.00. *see,* Appendix C to the Court's Opinion.

3. The estimated total cost for the non-court ordered magnet programs in place in Lorain for the 1990-91 school year is $1,700,486.00.[15]

4. By the third year of Lorain's magnet desegregation program, the $2,000,000.00 allocated for the seven year period of the desegregation plan was spent and Lorain was supporting much of its magnet program through general funds. Transcript, Docket No. 394 at 418.

5. To effect its magnet desegregation program Lorain had to add many additional employees. *Id.* at 421. Lorain had to add a desegregation specialist as well as addi-[1236]tional administrators, teachers and clerical persons. Lorain employed 692 teachers in 1984. Lorain employed 804 teachers after implementation of its magnet program. Transcript, Docket No. 402 at 826.

6. In order to attempt to achieve the hiring goals under the Consent Decree, Lorain had to increase salaries so that it could be competitive in the job market and attract minority applicants. *Id.* at 421-22.

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[14] Attached as Appendix C to the Court's Opinion is a summary of the costs of Lorain's court-ordered magnet programs broken down by category.

[15] Attached as Appendix D to the Court's Opinion is a summary of the costs of Lorain's non-court ordered magnet programs broken down by category.

7. Lorain has received about $3,400,000.00 in federal grant money for its magnet programs. *Id.* at 434. Lorain's last grant was received in fiscal year 1990. Transcript, Docket No. 386 at 167.

8. The Lorain City School District's total property tax valuation for the tax year 1989 was $469,223,128.00 consisting of agricultural, residential, industrial, commercial, public utility, personal property and railroad. Transcript, Docket No. 399 at 30. Lorain has 3.44 millage within the 10 mill limitation, voter approved, 28.20 outside (the ten mill limitation) millage on a continuing basis. Under Ohio law, voters in the school district may adopt millage on a continuing basis or on a fixed term emergency basis. Lorain has in place a 7.45 emergency five-year levy. The final year of collection of the five-year levy is 1992. Lorain also has in place a 7.50 emergency three-year levy. The last year of collection for that voted levy is 1991. A failure by the Lorain voters to renew the two emergency levies totaling 14.95 millage will create even more serious financial problems for the district and the implementation of the desegregation order. *Id.* at 3031.

9. Lorain has the lowest tax value per pupil out of the five major Ohio cities under desegregation orders. Lorain's tax value per pupil is about $39,908.00 while Cleveland's is $56,660.00, Dayton's is $56,928.00, Cincinnati's is $78,330.00 and Columbus' is $82,871.00. Lorain Board of Education Exhibit 5002. Lorain ranks about 408th out of about 612 school districts in Ohio in tax value per pupil. Transcript, Docket No. 386 at 177.

10. Lorain's local tax rate is 53rd in the State. Transcript, Docket No. 386 at 176. When Lorain's local support is combined with its property tax valuation, it is

found that the District is voting millage above the State average, but is still not able to generate enough dollars to support its programs since the property base is so low. *Id.* at 177.

11. Several years ago Lorain elected to become involved in an early retirement program. The Early Retirement Incentive ("ERI") program was a negotiated portion of a collective bargaining agreement. Transcript, Docket No. 394 at 459. Lorain entered into the ERI program as a way to save money in the long-term by replacing teachers on the high end of the salary scale with teachers at the lowest end of the pay scale. Lorain also entered into the ERI program as a way to free up positions so that they could be filled by minorities and Lorain could work toward achieving its affirmative action goals under the Consent Decree. *Id.*

ERI's have certain up front costs since a school district must buy out the existing contracts. However, ERI's are cost effective in the long-term. The school district involved in an ERI must make payments to the State Teachers Retirement System ("STRS") on behalf of those persons agreeing to retire early. *Id.* at 460.

The costs of the ERI program are determined by the STRS. Transcript, Docket No. 401 at 748. The costs are based on actuarial tables provided to participating school districts by the STRS. In the early days of ERI programs, simple actuarial accounting was utilized and the ERI programs were a good deal for school districts. However, recently the costs of the ERI program have skyrocketed due to changes made in the actuarial tables by the STRS.

Lorain discovered that if all persons eligible to take advantage of the ERI were to take advantage of it in the Spring of 1991, Lorain would have to pay out $9,387,460.00.[16] Recognizing the potentially dev-[1237] astating effect of the ERI, Lorain met with the teachers union and the administrators association in October of 1990 and negotiated a new contract to begin in August of 1991. As part of this bargain, the teachers association and administrators association and Lorain agreed that anyone who was planning to elect to take the ERI had to make him or herself known by a date certain. The contract entered into by Lorain is less costly than the ERI program would have been had all persons eligible for early retirement taken the option. Transcript, Docket No. 401 at 762. Twenty-four teachers and two administrators are retiring under the ERI in fiscal year 1991 at a cost to Lorain of $2,972,915.00. Transcript, Docket No. 401 at 752; *see*, Appendix E to the Court's Opinion.

12. Lorain's contract with its teachers that runs from August 1, 1988 until August 31, 1991 provided for a ten percent pay increase in January of 1990 and a 6.5 percent pay increase in August of 1990. Transcript, Docket No. 401 at 765. The newly negotiated three-year teachers' contract to go into effect in August of 1991 provides for raises of five percent for each year beginning in August of 1991. The contract also provides for the option of cashing in an increased number of sick days. In addition, the contract provides for additional steps at the top of the pay scale. *Id.* at 767.

13. Lorain's average teacher salary for fiscal year 1991 is $34,259.00 compared to an average teacher salary in the State of Ohio which is $32,053.00. Transcript,

[16] Attached as Appendix E to the Court's Opinion is a summary of the ERI costs to Lorain and a description of the ERI program.

Docket No. 386 at 178. Lorain's average teacher salary is second in the county, second by type of district, and 93rd in the State. *Id.*

14. In school year 1989-90, the average teacher salaries in the major Ohio cities involved in desegregation programs were as follows: 1.) Cleveland—$34,465.00; 2.) Columbus—$32,450.00; 3.) Cincinnati—$32,487.00; 4.) Dayton—$31,155.00, and 5.) Lorain—$29,256.00.

15. It is projected that Lorain will pay approximately 97.5% of its total revenue for salaries and fringe benefits in fiscal year 1991. Transcript, Docket No. 386 at 159.[17] The average school district spends about 84 to 85% of its general operating funds on salaries and fringe benefits. *Id.*

16. Lorain made numerous reductions and cuts in its budget in the face of its financial crisis. Lorain, *inter alia*, cut the hours of library aides, monitors, and magnet teacher aides, made changes in transportation, made cuts in textbook adoptions, and cut out a math program. Transcript, Docket No. 401 at 727. The Board made cuts in its own budget, and overtime was reduced. *Id.* at 727-28. These cuts, made in December of 1990, resulted in over $963,000.00 in savings. *Id.* at 728. All but about $200,000.00 worth of these cuts are permanent. *Id.*

A second round of cuts were made in February of 1991. On February 6, 1991, Lorain eliminated Spring activities and sports programs. Lorain also eliminated the need for night custodians, and started a policy

[17] Attached as Appendix F to the Court's Opinion is a State of Ohio, Department of Education, Projection of Revenue and Expenditures and Balances for the Lorain City School District, Lorain County (SM-5) dated March 20, 1991 and March 21, 1991.

whereby classrooms are cleaned only every other day. These cuts resulted in a savings of $1,066,000.00. *Id.* at 728-29.

In April of 1991 Lorain decided to make the following additional cuts effective July 1, 1991. Lorain will close Harrison Academy at a savings of about $73,000.00, and will close the administrative building at an approximate savings of about $150,000.00 per year. By closing these buildings Lorain will save over $700,000.00 in repair work that would be necessary were the buildings to remain open. Lorain will reorganize the Hawthorne/Boone school at a savings of $318,000.00; Lorain will also change some school buildings around. Lorain will make a reduction in support staff of over $760,000.00 and also a reduction in transportation costs of $275,000.00. Lorain will save $258,000.00 by reducing six administrators. *Id.* at 732.

Lorain has made total reductions in spending this year in the amount of $3,862,-[1238]-000.00, and only $286,000.00 of the reductions are one time only savings. *Id.*

V. FACTUAL BACKGROUND LEADING TO THE STATE'S AGREEMENT TO PAY 50% OF THE COSTS OF THE LORAIN DESEGREGATION PLAN UP TO A CAP OF $1,000,000.00.

1. The Consent Decree provides that the State of Ohio will pay to the Lorain City School District 50% of the costs of the Lorain Desegregation Plan up to a cap of $1,000,000.00. Consent Decree, Docket No. 76 at 4.

2. The last payment by the State of Ohio to Lorain for purposes of the desegregation plan was made in fiscal year 1988. Transcript, Docket No. 386 at 167.

3. Dr. G. Robert Bowers, former Assistant Superintendent of Public Instruction in the Ohio Department of Education, was involved in all of the desegregation cases in the State of Ohio involving the State Department of Education, including the Cleveland, Columbus, Dayton, and Cincinnati cases.[18] Dr. Bowers was the representative for the State of Ohio in the Lorain desegregation case. Dr. Bowers advised Dr. Pavic, then Superintendent of the Lorain City School District, to settle the Lorain desegregation case since Dr. Bowers felt that if the case went to trial the defendants would be found liable for discrimination. *Id.* at 87; Transcript, Docket No. 394 at 406.

4. In the Cleveland, Columbus and Dayton cases, the school systems were found liable and the State of Ohio was ordered to pay 50% of the costs of implementing the desegregation plans stemming out of those cases.

5. As testified to by Dr. Bowers, the State of Ohio has never challenged at an appellate level a district court's order following a finding of discrimination that the State of Ohio must bear 50% of the costs of implementation of a desegregation plan. Transcript, Docket No. 383 at 50-51.

6. Dr. Bowers proposed to Dr. Pavic that the State contribute 50% of the desegregation costs up to a cap of $1,000,000.00. Transcript, Docket No. 383 at 28. Neither Superintendent Pavic nor the Lorain City School District

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[18] *See, Reed v. Rhodes*, 422 F.Supp. 708, (N.D. Ohio 1976), *modified*, 607 F.2d 714 (1979) *cert. denied*, 455 U.S. 1018, 102 S.Ct. 1713, 72 L.Ed.2d 135 (1982); *Columbus Board of Ed. v. Penick*, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979); *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979); *Bronson v. Bd. of Ed. of Cincinnati*, 604 F.Supp. 68 (S.D. Ohio 1948).

had previous experience in a desegregation lawsuit. Transcript, Docket No. 394 at 407-408. Bowers' $1,000,000.00 proposal was not negotiated; rather, the State, through Dr. Bowers, offered that amount to Lorain and Lorain accepted the $1,000,000.00. Transcript, Docket No. 394 at 411.

7. Dr. Bowers used the earlier settlement agreement entered in the Cincinnati desegregation case as a model for the State's settlement proposal in Lorain. Transcript, Docket No. 383 at 28.

8. Following intense negotiations between the State and the Board of Education for Cincinnati which included the involvement of then Governor Rhodes, the State agreed to contribute $35,000,000.00 toward the desegregation costs in the Cincinnati case. At the time the Consent Decree was entered in the Cincinnati case, Cincinnati was already transporting 14,000 students in the magnet school program designed to bring about the integration of the student population. Under the terms of the Consent Decree, Cincinnati agreed to increase the magnet school student population to 20,000. The State's contribution of $35,000,000.00 was related to transportation and capital costs involved in increasing the student population in the magnet school program. The $35,000,000.00 State contribution was to be used to achieve the movement of between 14,000 to 20,000 pupils or an average of 17,000 pupils in order to effect the terms of the Cincinnati Settlement Decree. Transcript, Docket No. 383 at 58.

9. Dr. Bowers proposed the State's contribution of $1,000,000.00 in the Lorain case [1239] because he determined that somewhere between 500 and 650 students would be involved in Lorain to achieve compliance with the Consent Decree's +20/-15%

mandate in comparison with the 14,000 to 20,000 students in the Cincinnati magnet school program. Using the median of 17,000, Dr. Bowers construed the comparison to constitute a ratio of 35 to 1. Those calculations formed the basis for Dr. Bowers' proposal that the State's 50% participation in the desegregation costs in Lorain be capped at $1,000,000.00. *Id.* at 28.

10. The enrollment in the Lorain City School District is approximately 12,300 students. The enrollment in the Cincinnati Public Schools is approximately 51,110.

11. The Court finds that the ratio utilized by Dr. Bowers to arrive at the $1,000,000.00 figure was faulty in that the testimony and evidence at the hearing in this case revealed that Cincinnati was already moving 14,000 students in magnet programs which were implemented prior to the entrance into the Cincinnati settlement agreement. Thus, the State's contribution was only going toward the start-up costs for involving an additional 6,000 students in the program. Likewise, as was outlined above, it was necessary to move greater than the 650 students it was originally thought would need to be moved in Lorain to effect compliance with the terms of the Lorain Consent Decree. Accordingly, the ratio used to justify the $1,000,000.00 cap was not realistic nor supported factually.

12. The State envisioned that one half of the $1,000,000.00 would go towards creation or start-up costs of magnet programs and the other half of the $1,000,000.00 would go towards transportation of students involved in the magnet programs. Transcript, Docket No. 383 at 59.

13. For fiscal years 1983 through 1990, the State of Ohio Department of Education has contributed the following amounts to the desegregation programs in the following cities: 1.) Cincinnati—$35,000,000.00 plus $543,628.56 in plaintiffs' attorney's fees; 2.) Cleveland—$213,372,782.67 plus $1,425,880.93 in plaintiffs' attorney's fees; 3.) Columbus—$41,654,210.00 plus $753,458.01 in plaintiffs' attorney's fees; 4.) Dayton—$29,516,508.00 and 5.) Lorain—$1,000,000.00 plus $60,078.15 in plaintiffs' attorney's fees.[19]

14. Neither Superintendent Pavic nor the Lorain School District had ever been involved in a desegregation lawsuit prior to the present case. Transcript, Docket No. 394 at 407-408. The State, as was stated above, had been a defendant in several desegregation cases and had recently been involved in the Cincinnati settlement.

15. Prior to implementation of its magnet program as a means of complying with the Consent Decree, Lorain had little knowledge of what is involved in starting and implementing a magnet program. In particular, Lorain did not understand or comprehend the magnitude of the costs of implementing a magnet desegregation plan. *Id.* at 476.

16. Lorain's commitment to the magnet school program as the means to comply with the Consent Decree has produced a successful desegregation program in that the magnet schools have produced a stabilization of the school population, both numerically and racially. Likewise, Lorain's commitment to achieving the hiring goals in the Consent Decree has resulted in a steady

[19] Attached as Appendix G to the Court's Opinion is a summary of the State of Ohio's share of desegregation expenses for fiscal year 1983 through fiscal year 1990 in the Cleveland, Cincinnati, Columbus, Dayton and Lorain City School Districts.

increase in the hiring of minorities for both the certificated and noncertificated staffs. The highly successful desegregation program in Lorain has cost a great deal more than it was originally thought the program would cost. The underlying premise of the State's agreement to pay 50% of the desegregation costs in Lorain was that the costs would not exceed $2,000,000.00. That premise was not realistic as Lorain's experience has demonstrated.

VI. LAW AND DISCUSSION.

A. *Statement of the Applicable Law.*

[1] The Court now turns to a discussion of the law regarding a court's authority to [1240] modify a consent decree. The Sixth Circuit explained in *Stotts v. Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), *rev'd on other grounds*, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984), that a "consent decree is essentially a contractual agreement subject to continued judicial policing." *Id.* at 556. The Sixth Circuit further explained that "[t]he terms of the decree, unlike those of a simple contract, have unique properties. A consent decree has attributes both of a contract and of a judicial act." *Id.* (citations omitted).[20] A trial court always has continuing jurisdiction to enforce a consent decree as written. *Id.* at 557. Likewise, a "trial court has continuing jurisdiction to modify a decree should its operation become unreasonable." *Id.* (citations omitted).

The traditional test to determine whether a trial court can rightfully modify a consent decree was set forth by the Supreme Court in *United States v. Swift &*

[20] The Sixth Circuit noted in *Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981), that "[a] consent decree is a strange hybrid in the law. It is a contract that has been negotiated by the parties. It is also a court order which can be changed by a court if circumstances warrant." *Id.* at 557.

Co., 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932), an antitrust case which was resolved through a consent decree. In *Swift*, the Supreme Court noted that "[a] continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *Id.* at 114, 52 S.Ct. at 462 (citations omitted). Thus, the Supreme Court recognized that a trial court does indeed have the power to modify a consent decree. The Supreme Court proceeded, however, to formulate a stringent standard for determining whether a modification of a consent decree is warranted in a particular case. The Court stated in this respect that:

> [n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

Id. at 119, 52 S.Ct. at 464.

Though cognizant of the stringent *Swift* standard for modification of consent decrees, several courts have begun to develop a less stringent standard for modification of consent decrees entered into in institutional reform litigation as opposed to litigation involving private individuals such as were involved in the *Swift* case. In *Heath v. DeCourcy*, 888 F.2d 1105 (6th Cir. 1989), the Sixth Circuit considered the appropriate standard for modifying a consent decree entered into by agreement of the parties in the context of institutional reform litigation. *Id.* at 1106. In that case, a group of inmates sued under 42 U.S.C. §1983 challenging the conditions of their confinement in a county jail in Hamilton County. The suit was resolved through the entrance into a consent decree. When the jail population began to exceed the capacity of the facility, the inmates sought to hold the county in contempt of the consent decree and the county moved to modify the consent decree.

The district court granted the county's motion in part, observing that "[t]he modification was 'mandated by common sense as it does not increase risk to the inmates and permits more effective utilization of the government's resources . . . ., thereby promoting the public interest of having reasonable and lawful sentences served.' " *Heath v. DeCourcy*, 888 F.2d at 1108. In granting the motion to modify the consent decree, the district court in *Heath* relied on a prior Sixth Circuit case. *Stotts v. Memphis Fire Dep't*, 679 F.2d 541 (6th Cir. 1982), in which the Sixth Circuit stated that

> a consent decree can be modified (1) when done in accordance with basic principles of contract law, (2) when the decree is void or no longer equitable, or (3) when the circumstances of the case change.

Heath, 888 F.2d at 1108 (citing *Stotts*, 679 F.2d at 560-61). The inmates appealed the district court's ruling.

The Sixth Circuit affirmed the district court's decision and held that the district court did not err in applying the standard set out in *Stotts v. Memphis Fire Dep't*, 679 F.2d 541 (6th Cir. 1982), *rev'd on other* [1241] *grounds*, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984), for modifying a consent decree. The Sixth Circuit noted that applying a flexible standard in modifying consent decrees is more appropriate in the context of institutional reform than in the context of consent decrees between private parties because, unlike consent decrees between private parties, the effect of institutional consent decrees reaches beyond the immediate parties and impacts on the public's right to the sound and efficient operation of its institutions. With respect to consent decrees arising out of institutional reform litigation, the Court in *Heath* observed that

> [b]roader judicial discretion to modify the parties' agreement is required so that the agreed upon solution to the problem giving rise to the litigation

> may be fine-tuned to accomplish its goal. The efficacy and consequences of a decree directing institutional reform cannot be seen clearly from the courtroom. Time and experience may yield new knowledge that compels modification of the original agreement [in order to accomplish its end].

Heath v. DeCourcy, 888 F.2d at 1109.

[2] Accordingly, the Sixth Circuit held that " in the area of institutional litigation, consent decrees arrived at by mutual agreement of the parties involved are subject to a lesser standard of modification than that dictated by *Swift*." *Heath v. DeCourcy*, 888 F.2d at 1110. The Court explained that to modify such consent decrees,

> the Court need only identify a defect or deficiency in its original decree which impedes achieving its goal, either because experience has proven it less effective, disadvantageous, or because circumstances and conditions have changed which warrant fine-tuning the decree. . . .

Id. The Sixth Circuit indicated that "[a] consent decree may . . . be modified where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes.' " *Id.* at 1108 (quoting *Chance v. Board of Examiners*, 561 F.2d 1079, 1086 (2d Cir.1977)).

The Sixth Circuit further elaborated that the less stringent standard "will require the trial court to balance the interest in preserving consent decrees entered into by agreement between private parties against the public interests sought to be achieved through modification of the decree." *Id.* at 1110. The Court noted, however, that:

> this standard is not inconsistent with *Swift*, since in the area of commercial consent decrees—which typically involve primarily private, not public, interests—any public interest in modifying the decree will ordinarily be less than the interest in

> honoring and preserving the private business arrangements established by the decree. Conversely, the public interest in modifying institutional consent decrees—which typically involve significant public interests—will ordinarily outweigh the interest of preserving the decree where sufficient reason for modification is shown.

Id.

This less stringent standard for modification of consent decrees in institutional reform cases has been applied by other Circuit courts as well. *Heath*, 888 F.2d at 1109. The Fourth Circuit applied a less stringent standard in *Plyler v. Evatt*, 846 F.2d 208 (4th Cir.1988), *cert. denied*, 488 U.S. 897, 109 S.Ct. 241, 102 L.Ed.2d 230 (1988), a prison reform case in which the State of South Carolina sought modification of a consent decree to allow double celling of prisoners. *Id.* at 210. The Fourth Circuit noted in *Plyler* that a strict standard for modification is "inappropriate in institutional reform litigation for 'the unique nature and demands of institutional reform litigation necessitate a more flexible approach to modification.' " *Id.* at 212 (citations omitted). The *Plyler* Court noted as well that "a consent decree may be modified in response to material changes in operative law or facts . . . [and an] unanticipated increase in [prison] population clearly is a change in operative facts which [1242] meets this predicate for modification." *Id.* at 211.[21]

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[21] *See also Badgley v. Santacroce*, 853 F.2d 50 (2d Cir. 1988) (court stating that "[t]hough some measure of flexibility is warranted in considering modification of consent decrees in the context of institutional reform . . . the guiding principle . . . is that modification is favored when necessary to carry out the purposes of the original decree"); *Newman v. Graddick*, 740 F.2d 1513 (11th Cir.1984) (court stating that "[w]here, however, a consent decree involves the

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The Court notes that the case before it is one involving school desegregation and not prison reform. However, the Court is convinced that the standard for modification of a consent decree set forth in the *Heath* opinion applies equally to the modification of a consent decree stemming out of a desegregation lawsuit.[22] In

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supervision of changing conduct or conditions and is therefore provisional, modification may be more freely granted"); *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114 (3d Cir.1979), *cert. denied*, 444 U.S. 1026, 100 S.Ct. 689, 62 L.Ed.2d 660 (1980) (court stating that when participants have made a good faith effort to meet the obligations of a consent decree "and the object nevertheless has not been fully achieved, clearly a court of equity has power to modify the injunction in light of experience").

[22] The Court finds persuasive the reasoning that while institutional reform litigation is not a homogeneous category, "institutional reform decrees do share certain characteristic features." Comment, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 Harv. L.Rev. 1020, 1033 (1986). Consent decrees in institutional reform litigation have the three following traits in common: 1.) The speculative and complex quality of the relief; 2.) The role of the government as an original defendant and 3.) The effects on nonparties to the litigation. *Id.* at 1033-1037.

The present case certainly involves these characteristic traits. The remedy chosen to meet the terms of the Consent Decree was speculative in that the parties had a general idea of how the desegregation plan would work but were unsure of specifics in terms of numbers of students involved and ultimate costs. Likewise, the remedy in this case is complex. There are a myriad of factors to consider which at times conflict with one-another such as the interest in desegregated schools versus the interest in providing quality bilingual education.

In addition, the remedy selected in this case definitely has effects beyond just the parties to the litigation. The entire community of Lorain is affected by this litigation and the resolution of the litigation. There are definitely additional costs associated with desegregation of a school system. Local dollars necessarily will be used to support the additional costs. Likewise, a desegregation remedy can impact the quality of education offered in a particular school system both negatively and positively.

Brown v. Bd. of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), the Supreme Court stated with regard to remedies in school desegregation cases that "[i]n fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Id.* at 300, 75 S.Ct. at 756. The Supreme Court also made reference to the interests at stake in school desegregation lawsuits: 1.) the "personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis[;]" and 2.) the public interest in the elimination of obstacles in the way of the operation of a constitutional school system. *Id.*

The myriad of desegregation lawsuits in this country following the landmark Supreme Court case of *Brown v. Bd. of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), have demonstrated the strong commitment in this country to public education free from any forms of discrimination. The Court is of the view that desegregation lawsuits, like prison reform suits, are lawsuits in which the public has a vested interest and which involve interests beyond those of the individual litigants.

Development and implementation of a desegregation plan will necessarily involve trial and error. A consent decree covering desegregation of a school district must be capable of being modified in certain circumstances so that the important purpose of the consent decree, the elimination of any and all vestiges of discrimination in the school system, can be accomplished. To the extent

the purpose of the consent decree is being frustrated, the Court must have the power to modify the consent decree so that the purpose can be achieved.[23]

[1243] The Court certainly recognizes the interest of litigants in having the consent decree which they enter into enforced as written. The Court is equally aware of the argument that if courts begin modifying consent decrees, litigants will be deterred from entering into settlement agreements for fear the agreements will later be reopened and the obligations be increased. The Court notes in this regard, however, that the *Heath* standard, though not as stringent as the standard enunciated in *Swift, supra*, is still a difficult standard to meet. Indeed, the Sixth Circuit set forth the circumstances under which a court may order a modification and indicated that modification should only be ordered by a district court following specific findings which demonstrate that modification is warranted. The *Heath* opinion in no way indicated that modification is lightly to be awarded.

The Court is of the view that modification in certain extraordinary circumstances will not deter parties from entering into settlements. The Court notes that if courts did not have the power to modify consent decrees then parties might be deterred from entering into settlements since they might fear that unforeseeable events would

[23] The Court is of the view that a more flexible standard of modification of consent decrees should be applied in institutional reform cases. As one commentator correctly pointed out, "This more flexible standard carries several advantages." Comment, *supra*, at 1037. A more flexible standard would "allow judges to respond—without resorting to doctrinal manipulation—to the kinds of problems that seem characteristic of institutional reform litigation: the problem of the speculative remedy, of the government defendant, and of the affected third party." *Id.* Likewise, such a standard allows the court to focus on the purpose behind the consent decree and to work toward effectuating that purpose. *Id.* at 1037-38.

occur which would necessitate a modification of the consent decree but that a court would be unwilling to order such a modification.[24]

[24] The State has held the position since the beginning of the fight over modification of the consent decree in this case that the standard for modification of consent decrees set forth in *Swift, supra*, should apply and that under that standard no modification should be ordered. In its most recent memorandum on the issue of modification, the State cites to a recent Fifth Circuit opinion. *Walker v. United States Department of Housing and Urban Development*, 912 F.2d 819 (5th Cir. 1990), for the proposition that the modification should not be granted in the present case. The Court finds the facts in the *Walker* case distinguishable from the facts in the present case and notes that in any event this Court is not bound by Fifth Circuit precedent but instead is bound by Sixth Circuit precedent which the Court finds allows for a modification of the Consent Decree in the present case.

In *Walker, supra*, a consent decree was entered into in a housing discrimination case. *Id.* at 822. As part of the consent decree, the Dallas Housing Authority ("DHA"), a defendant in the lawsuit, was to submit a plan to the United States Department of Housing and Urban Development ("HUD") for the revitalization of a Dallas housing project. A plan was submitted by DHA which was approved by HUD. Additionally, HUD pledged sufficient federal resources to provide 1,000 units of additional housing under the revitalization plan, apart from 800-900 units which were to be modernized. The district court then approved the revitalization plan. Subsequently, HUD announced to DHA without obtaining prior court approval that it would drastically reduce its subsidization of the project. A motion to enforce or modify the consent decree to restore past levels of HUD subsidization was then filed and the district court ordered HUD to pay $1.8 million to DHA, representing the aggregate loss to DHA in federal funding. *Id.* at 822-823. HUD then filed an appeal in which it argued that the consent decree contains no binding agreement between DHA and HUD regarding funding and that the remedy imposed by the district court was beyond the scope of the instrument.

The Fifth Circuit found that it was improper for the district court to order HUD to make a financial contribution since the "court-ordered subsidization is not authorized by the consent decree's plain language." *Id.* at 826. The Fifth Circuit further found that "[s]ince we cannot conclude that the consent decree, as confined by its plain

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[1244] B. *Application of the Law to the Facts of the Present Case.*

[3] The Court finds, for the reasons set forth in this section, that a modification of the consent decree to increase the State's contribution is warranted. The extensive evidence which the Court heard through the various hearings conducted on this matter has convinced the Court that the consent decree should be modified since a better appreciation of the facts in light of experience indicates that the decree in terms of the State's contribution to the desegregation plan in Lorain is not properly adapted to accomplish its purpose. *Heath*, 888 F.2d at 1108 (citations omitted).

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language, has been frustrated as a consequence of reduced subsidies, we remand the case for the district court's more informed view on this matter." *Id.* at 827.

In the *Walker* case, HUD had never specifically promised to make contributions toward the demolition of housing units; rather, HUD had indicated that it would consider request from the DHA for demolition funds. The Fifth Circuit found that the district court made an improper and strained interpretation of the consent decree when it found that HUD was obligated to make funding available.

In the present case, the State clearly agreed to make a financial contribution to the Lorain desegregation plan. Granted, the Consent Decree provides for a $1 million cap on the State's contribution. However, the Court has made extensive fact findings which support the Court's conclusion that modification is warranted in the present case with respect to the amount of the State's contribution. This is not a case as in *Walker* where the Court is attempting to argue that the language of the Consent Decree provides for State Funding beyond the $1 million cap. The Court acknowledges that the Consent Decree as it now stands does not provide for additional state funding. However, the Court finds, for the reasons set forth with specificity below, that a modification is warranted under the standard set forth by the Sixth Circuit in *Heath, supra.*

As the Court indicated in its findings of fact above, the amount of money which the parties envisioned would be adequate to fund the desegregation program in Lorain was wholly unrealistic. Lorain has implemented a successful desegregation program through the use of magnet schools. Experience has shown that the desegregation of the Lorain City Schools has been much more expensive than was originally contemplated. The increase in cost was due in large part to the fact that the parties did not have an accurate figure to work with as to the true number of students that would have to be moved to achieve desegregation. Likewise, the parties did not take into account the costs associated with the development and expansion of a bilingual program in the Lorain City School District which is an integral component of the desegregation of the Lorain City School District.[25]

[25] The Court notes that it considers the costs of the bilingual program in Lorain as costs of the desegregation plan in Lorain since the Court finds that adequate bilingual education is an important component of the Consent Decree in this case. At the hearing on this matter the State elicited testimony to the effect that the State only agreed under the terms of the Consent Decree to contribute 50% of the costs of the evaluation of the bilingual program then in place in Lorain but did not agree to share in the costs of developing and implementing an effective bilingual program in the Lorain City School District.

The Court agrees that the language in the Consent Decree with respect to this point is somewhat misleading. However, it is the Court's view, having construed the entire Consent Decree in light of the purpose behind the Decree, that the State's share was to include the costs of the bilingual program in Lorain and not just the costs of the evaluation of the bilingual program. In Paragraph 4 of the Consent Decree the State agreed to pay "50 percent of the expenses incurred by the Lorain City School District in designing, implementing, administering and maintaining educationally sound programs reasonably expected to reduce racial isolation . . ." Consent Decree, Docket No. 76 at 4. Intricately bound up with the need to eliminate racial isolation in the Lorain schools is the need to maintain

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The terms of the decree are no longer equitable in the Court's view. The State has spent a considerable amount of time and money trying to persuade the Court that the reason Lorain cannot fund its magnet school desegregation program is due to Lorain's own unwarranted expansion of the program beyond that necessary to achieve desegregation and due to Lorain's fiscal mismanagement. The Court was not, however, persuaded that Lorain is unable to fund its desegregation program for reasons all its own. Rather, the Court is persuaded that experience has shown the desegregation program is larger and more costly than it was originally thought it would be.[26] This is not the fault of Lorain [1245] for going beyond the scope of the plan. Instead, the premise upon which the financial portion of the decree was based was faulty.

Likewise, the Court was not persuaded by the State's arguments that Lorain has mismanaged its finances by overextending itself in terms of salaries and fringe benefits. The Court finds that Lorain should not

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quality bilingual education in order to effectively mainstream students with special language needs. The State's agreement to pay 50 percent of the expenses incurred toward achieving the goals set forth in the goal statement thus encompasses the costs of the bilingual program since it is a part of the overall costs of desegregation of the Lorain City School District. The specific statement that the State will contribute 50 percent toward the costs of the evaluation must be read in light of the State's agreement to contribute 50 percent toward the costs of the overall desegregation program which, the Court found above, clearly includes within its ambit the development and implementation of an effective bilingual program.

[26] The Court notes that it has asked Lorain to separate out the costs of the non-court ordered magnets. The Court will not require the State to pay any of the costs of the non-court ordered magnets as they are not costs of implementing the desegregation plan but rather are costs Lorain voluntarily assumed.

be penalized for trying methods such as the ERI and salary increases in order to open positions for minorities and to lower salaries in the long term. Lorain can never hope to reach the hiring goals in the Consent Decree unless it can offer competitive salaries and free up otherwise occupied positions.

The Court finds that in order to effectuate the purpose of the Consent Decree, the Decree should be modified to the effect of an increase in the State's contribution to the Lorain desegregation program. In the next section of its Opinion, the Court sets forth the amount that the State will be required to pay.

VII. REMEDY.

A. *The Monetary Award for 1989-90.*

The Court turns now to a determination of the amount of additional funding that defendant the Ohio Department of Education shall be required to provide to Lorain to carry out the financing of the desegregation plan for the Lorain City School District. Initially, the Court finds that it is improper to require the State to contribute toward the costs of desegregation into the future on a continuing basis. That is, the Court is of the view that at some point Lorain must absorb the costs of its magnet and bilingual programs into its general costs of operating the school district.[27] Moreover, as Lorain

[27] There was much questioning at the evidentiary hearings on this matter with regard to when a school district should absorb the costs of desegregation programs. Specific to the situation in Lorain, several witnesses were asked when the State's obligation to assist with Lorain's desegregation program will end. It is the Court's view that the State should not be required to contribute to the desegregation plan into the future indefinitely. That is, the Court believes that there is a point in time when Lorain should bare [sic] the responsibility for its magnet school program.

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continues in its quest to meet the hiring goals, it moves toward the day when it will be permitted to be relieved of the continuing supervision of this Court. An open-ended obligation imposed on the State to continue to fund in some measure the costs of desegregating the Lorain schools would have the potential of removing Lorain's incentive to meet the hiring goals and thus meet all of its obligations under the Consent Decree. Accordingly, the Court's order regarding an increased State contribution will provide for a gradual decrease and eventual discontinuance of the State's contribution to the Lorain desegregation plan.

The Court orders that the State pay to Lorain the sum of $2,600,917.00 as 50% of the desegregation costs[28] for the 1989-1990 school year.[29]

(Footnote continued from preceding page.)

However, the Court is also of the view that Lorain should have been provided with more State funding initially to start the programs up and to run them for several years until it was viable for Lorain to assume full financial responsibility for the programs. To the extent that Lorain was not provided with sufficient initial funding, it has not been able to assume full financial responsibility for the programs.

[28] Desegregation costs include the costs of the bilingual program.

[29] The Court anticipates that either the State or Lorain or both may appeal the Court's Order. In the interim, the Court is concerned about the fiscal welfare of the Lorain school system and the potential negative impact non-payment by the State pending appeal could have on the welfare of the Lorain school system and the implementation of the desegregation plan. Accordingly, the Court suggests that the State and Lorain should consider entering into an agreement calling for the immediate payment of the $2,600,917.00 herein ordered to be paid with the understanding that neither party would forego its right to prosecute an appeal from this Order and with the additional understanding that if the appeal results in a ruling that this Court erred in requiring the State to pay the additional monies, that the State would be reimbursed through subsequent deductions over a stated period of years from the monies due Lorain through the State Foundation Program. Such an agreement would enable Lorain to engage in better long-range fiscal planning and would likewise enable Lorain to advise its constituents on whose support it relies for additional funding as to the short-range and possible long-range consequences of this Court's Order.

[1246] B. *The Monetary Award for School Years 1990-1991, 1991-1992, 1992-1993, & 1993-1994.*

The Court orders the State to pay 40% of the Lorain desegregation costs for school year 1990-1991. The Court further orders the State to pay 30% of the desegregation costs for the 1991-1992 school year; 20% of the desegregation costs for the 1992-1993 school year, and 10% of the desegregation costs for the 1993-1994 school year.[30] The State shall no longer have a duty to contribute financially to the Lorain desegregation program following the 1993-1994 school year.[31]

Lorain is granted leave to file for its award of the 40% allowance for the desegregation costs of the school year 1990-1991 as soon as it has its final figures. The motion shall be accompanied by a detailed accounting and be served on the State's counsel of record. The State

[30] As a final gesture toward getting the parties to consider a settlement of the controversy, the Court suggests that the parties might reach an agreement on a fixed sum of money to constitute 40%, 30%, 20% and 10% of the desegregation costs for the four school years beginning with school year 1990-1991 and further agree on a schedule of payments for each of the four years thus eliminating the probability of additional litigation over a determination of the exact amount of Lorain's costs in the implementation of the desegregation plan for each of the four remaining years.

[31] The total contribution of the State required by this decision will depend on Lorain's continuing cost in implementing the desegregation order. However, it appears likely that the overall cost of the State's contribution to the Lorain desegregation program will be approximately $9,000.000.00. The Court believes that sum to be reasonable for the reasons set forth in its Opinion. Moreover, by way of comparison with the State's contribution to the implementation of the Cincinnati desegregation order, the Court observes that the student population in Cincinnati, approximately 51,110, is about four times that of Lorain at 12,300, and the State's $35,000,000.00 contribution to the Cincinnati desegregation program is approximately four times that of the anticipated State contribution to Lorain using the estimated sum of $9,000,000.00.

shall have thirty days to file objections in the event the State elects to challenge the accounting. A similar practice shall apply to the three remaining years of 1991-1992, 1992-1993, and 1993-1994.

C. *Interest on the Award.*

The monetary award payable by the State to Lorain for the school year 1989-1990 in the sum of $2,600,917.00 shall bear interest at the rate prescribed by law from the date of the judgment unless the State pays the principal amount of the judgment within sixty days of the date the Judgment Entry is filed. A similar interest award shall be granted as to the remaining years with the proviso that no interest will be payable if the principal amount is paid within sixty days of the Judgment Entry.

D. *Attorney Fees.*

Counsel for the plaintiffs and counsel for CHIP are each entitled to attorney fees for the time devoted to the hearings required by Lorain's motion for a modification of the Consent Decree. The Court finds that the attorney fees for the work done in 1990 shall be paid on a 50/50 basis by Lorain and the State. However, the Court is of the preliminary view that the attorney fees to which plaintiffs' and CHIP's counsel are entitled to for 1991 shall be paid entirely by the State in view of the State's decision not to negotiate a resolution of the dispute between Lorain and the State following the Court's Order of August 17, 1990 (Docket No. 338). Under the circumstances, the Court is of the view that it would be inequitable to require Lorain to pay half of the fees of plaintiffs' and CHIP's counsel for their work required by the extensive evidentiary hearings conducted in 1991.

Counsel for plaintiffs and counsel for CHIP are instructed to submit a detailed application for attorney's fees to the Court as soon as practicable.

VIII. CONCLUSION.

For the reasons set forth above, the motion of defendant Lorain Board of Education for a modification of the Consent [1247] Decree to provide that the State contribute additional monies toward the financing of the desegregation plan in place in the Lorain City School District is granted.

IT IS SO ORDERED.

CONSENT DECREE FILED IN THE UNITED STATES DISTRICT COURT

(Approved and Filed August 13, 1984)

Case No. C79-1775

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LORAIN NAACP etc., *et al.*,
Plaintiffs,

vs.

LORAIN BOARD OF EDUCATION, *et al.*,
Defendant.

DOWD, *J.*

CONSENT DECREE

Plaintiffs brought this action, on behalf of themselves and as representatives of a class of persons consisting of all minority persons who reside in the Lorain City School District, against the Boards of Education of the Lorain City School District and State of Ohio and all other individual defendants.

This complaint alleges that the defendants have engaged in a pattern of practice of discrimination against Blacks and Hispanics in the closing of certain school facilities, the assignments of students and the hiring and assignment of teachers and administrators.

Plaintiffs and defendants, by and through counsel, believe that it is in the best interests of the Lorain City School District, including its students, residents and employees to settle the claims made in the complaint by virtue of and in accordance with the terms and conditions of this Consent Decree.

The Court finds that:

1. The parties have waived the need to make findings of fact and conclusions of law on all issues raised in the complaint, except the issue regarding plaintiffs' right to and the amount of attorney fees incurred in the prosecution of this action.

2. The parties concur and agree that nothing in this Consent Decree shall be construed as an admission by any of the defendants of any violation of any provision of the Constitutions of the United States or the State of Ohio.

3. The parties have developed and entered into an agreement wherein certain goals related to educational and employment opportunities have been outlined. The agreement, hereinafter referred to as the "Goal Statement," is attached hereto and incorporated herein.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED as follows:

1. Immediately upon the journalization of this Decree the Lorain Board of Education will begin to develop a plan by which the objectives outlined in the Goal Statement will be achieved. A draft of the proposed plan shall be submitted to plaintiffs' counsel for review and approval within 90 days of the signing of this Consent Decree. A final draft of the plan shall be submitted to the Court for approval no later than 150

days after the signing of this Consent Decree. In the event the parties are unable to reach agreement within 165 days of the signing of this Consent Decree, a hearing shall be held to allow the parties an opportunity to present their views and/or the Court to take appropriate action.

By no later than June 5, 1984, the parties through counsel will meet to attempt to agree on what date implementation shall commence. If the parties are unable to agree, then either party may petition the Court to determine when implementation shall commence.

2. The plan as approved and ordered by the Court shall be implemented at the start of the school year immediately following the date the plan is approved unless otherwise provided for in the plan itself or by further order of the Court.

3. The plan shall provide for the creation of a seven member Board of Review consisting of two members designated by the Lorain Chapter of the NAACP, two members by the Lorain City Board of Education and two members by the State Superintendent of Public Instruction. The seventh member shall be selected by a majority of the other six, or by the Court if a majority cannot agree on the seventh member. The seventh member shall be a Hispanic person if none of the first six members are Hispanic. It shall be the responsibility of the Board of Review to oversee the implementation of the plan approved by the Court. The Board of Review shall generally address grievances arising from or concerning the implementation of the plan and shall attempt to resolve such grievances so as to minimize and/or eliminate the need for Court involvement. The specific duties and procedures of the Board of Review

shall be detailed in the plan. Said duties shall minimally include the obligation to make quarterly reports during the life of the Consent Decree.

4. The State of Ohio will pay to the Lorain City School District 50 percent of the expenses incurred by the Lorain City School District in designing, implementing, administering and maintaining educationally sound programs reasonably expected to reduce racial isolation to the standards defined in the Goal Statement. The State of Ohio will pay 50 percent of the unreimbursed expenses attributed to the transportation of students who are being transported for the reduction of racial isolation. "Unreimbursed expenses" shall mean the portion of this expense which remains after deducting the state transportation reimbursement applicable to students involved in such transportation.

The total of the expenses referred to above shall be limited to those incurred during the seven school years 1984-85 through 1990-91, and the State of Ohio payments shall not exceed $1 million during the seven year term, or 50 percent of the actual reduction of racial isolation costs, whichever is less.

Beginning in December 1984, payments made by the State shall be made semi-annually in the months of December and June upon the submission of vouchers covering costs actually incurred by the Lorain City School District. Such payments shall be in addition to all other state and federal funds to which the Lorain City School District may be entitled under law and regulations existing at the time of the submission of the vouchers.

5. This Consent Decree shall remain in effect until the goals which are a part of the Decree have been achieved whereupon this Decree shall expire.

6. Upon the execution of this Consent Decree by counsel for the parties and its approval by the Court, all individual defendants shall be dismissed, with prejudice, as to the allegations contained and relief sought in the complaint. Upon the adoption and approval of the plan by the Court both Boards of Education shall also be dismissed with prejudice, except the Lorain Board of Education and the State Board of Education shall remain parties to this action for purposes of enforcing this Decree and the plan adopted pursuant thereto. Within 90 days from the date the Court approves this Decree, plaintiffs shall prepare and submit to defendants an application for costs and fees. To the extent the parties are unable to reach agreement on plaintiffs costs and fees within 60 days, plaintiffs shall submit a formal application to the Court for its consideration and adjudication. Nothing in this provision shall be interpreted so as to preclude defendants from challenging plaintiffs' entitlement to attorney's fees, and/or costs or the amount thereof.

7. Upon motion of the plaintiffs, the Court shall hold a hearing in December 1987 to evaluate the extent to which the terms of the Consent Decree have been achieved, are being achieved, or are likely to be achieved in light of past performance towards the goals of the Decree. The Lorain District shall have the responsibility to demonstrate, with respect to the goals of the Decree, including the hiring goals, that the pace at which performance is going forward holds out a reasonable probability of achieving the goals by the end of the Consent Decree. Plaintiffs shall have an opportunity to

demonstrate that past and current performance suggests that the goals of the Decree will not likely be achieved. If plaintiffs prevail at the hearing, the Court shall order such additional remedial measures as may then seem reasonably required to achieve the goals of the Decree.

/s/ DAVID D. DOWD, JR.
David D. Dowd, Jr.
U. S. District Judge

APPROVED:

/s/ THOMAS I. ATKINS
Thomas I. Atkins, Counsel for plaintiffs

/s/ JAMES L. HARDIMAN
James L. Hardiman, Counsel for plaintiffs

/s/ ANTHONY B. GIARDINI
Anthony B. Giardini, Counsel for Lorain defendants

/s/ RICHARD W. ROSS
Richard W. Ross, Counsel for State defendants

GOAL STATEMENT

I. *Educational Goals*

A. Composition of Student Population in Schools

1. Eliminate racially identifiable schools, caused by student and/or teacher assignments, consistent with other goals of this Goal Statement.

2. Assign students to school attendance areas so that each school will establish a composite minority student ratio of no more than a deviation of +20 or -15 percent from the District Average percentage of each identifiable minority's student racial composition.

3. The parties agree that the Lorain City School District shall retain an independent contractor to evaluate the bilingual programs currently in effect to determine program effectiveness. The cost of such evaluation shall be considered part of the cost of implementation of the Consent Decree and up to 50 percent of the cost shall be reimbursed by the State of Ohio as provided in Item No. 4 of the Consent Decree.

Eliminate program shortcomings discovered in the evaluation process and implement modifications.

(a) Maintain bilingual programs for Hispanic students.

(b) Comply with both federal and state bilingual statutes and *Lau v. Nichols* which interpreted the provisions of the 1964 Civil Rights Act, Title VI.

(c) Assign non-, or limited-, English proficient students only to schools which are adequately staffed and equipped to meet their diagnosed lingual needs.

4. Provide a mechanism by means of which students may transfer from their school of assignment to other schools, provided that the transfer does not adversely affect the racial composition of the sending or receiving school.

5. Assure that any student assignments or reassignments required to comply with the goals of this Decree will be carried out in a manner which equitably allocates the burdens on the students. Assure that any school closings which are necessary to comply with the terms of this Decree are carried out in a manner which equitably allocates the burden of such closings on the various neighborhoods of the City.

6. Student reassignments necessary to establish and maintain the percentages of non-white students in each building at the +20 or -15 percent level will be implemented in a manner that will ensure that whatever "burden" of movement there may be will be equitably shared by both non-white and white students. If any additional schools are closed, students from those schools shall be reassigned in a manner that ensures that each receiving school will have a composite minority student ratio or no more than a deviation of +20 or -15 percent from the district average percentage or minority students.

7. The parties agree that, in the first year of the Plan's operation, students who would be entering the final year (6th, 8th, 12th) in a school will be guaranteed the option to remain in that school.

B. *Establishment of "Effective Schools" Plan*

The Lorain Board of Education recognizes the importance of the "effective schools" concept developed by the Ohio State Department of Education. It is the responsibility of the Board of Education and its staff, with such state support as is necessary, to assure that non-white and/or economically disadvantaged children are afforded an equal opportunity to master basic school skills characteristic of successful academic performance. During the 1984-1985 school year, each school in the district shall develop and begin to implement a written "effective school" plan that will incorporate the following principles:

1. *A Sense of Mission*

All students are expected to master basic school skills. Acquisition of basic school skills by a student shall take precedence over all other school activities even where energy and resources must be diverted from other activities to achieve that end.

2. *Strong Building Leadership*

Principals of school buildings are in fact, the instructional leaders of the school staff. Principals must be creative and dedicated to the "mission" of the school.

3. *High Expectations for All Students and Staff*

Teachers are expected to teach and students are expected to learn. Standards are to be high, but realistic. No students will be allowed to attain less than a minimum mastery of the basic skills at the assigned grade level. Teachers must believe that they have the ability to provide the required instructional program and that all students are capable of mastering the basic skills taught to them.

4. *Frequent Monitoring of Student Progress*

Effective schools have teachers and principals who are constantly aware of pupil progress in relationship to the instructional objectives.

5. *A Positive Learning Climate*

Effective schools have an atmosphere that is orderly without being rigid, quiet without being oppressive, and generally conducive to the instructional mission.

6. *Sufficient Opportunity for Learning*

Effective schools emphasize more time on task. The more time spent on instruction, the greater the learning that takes place. Implications exist for improved use of time, individualized instruction and curriculum content.

7. *Parent/Community Involvement*

Effective schools have broad support. Parents influence their children in a number of ways: through their expectations for their children; through their own involvement; and through direct instructions.

The parties accept the premise that effective schools and desegregation are complementary and supplementary. The implementation of the effective schools concept, based upon the seven principles stated above, will hopefully result in measurable improvement in student achievement for all students, including and especially the non-white and poor which is and should be the primary concern of the entire school community. The parties agree that there will be no tracking or steering of students in a racially discriminatory manner. It is anticipated that the remedial educational programs will

necessarily continue until such time as the "effective schools" concept is fully implemented and through the concept the need for remedial programs declines.

II. *Disciplinary Goals—Policies and Procedures Related Thereto*

1. Examine to what extent, if any, non-white students are disciplined to a greater degree, either in terms of the type of discipline or the rate of discipline, than are white students.

2. Eliminate the existence or appearence of disparate treatment of non-white students if any is found to exist, in an appropriate, positive and educationally sound manner.

3. Increase the emphasis placed on dealing with potential behavioral problems, through counseling and classroom procedures which will be designed to treat behavioral problems before they become serious in nature, thereby eliminating to as great an extent as possible extreme disciplinary actions such as suspension, expulsion or corporal punishment.

4. Maintain appropriate documentation, through the building principal, of all the efforts made to correct behavioral problems where suspensions, expulsion or corporal punishment is recommended.

5. Examine and critically review the "Student Handbook" and other published regulations to determine whether any provision in these documents might result in the disparate treatment of non-white students.

III. *Affirmative Action With Reference to Employment Opportunities*

A. Hiring Goals and Rate:

1. The HIRING GOAL shall be minority/majority ratio of the adult population in Lorain in the year of achievement.

2. The same goal shall apply to both Certificated and non-Certificated personnel at each level of responsibility within the school system.

3. The HIRING RATE for certificated teaching staff during the 1984-85 school year shall be 20% Black and 20% Hispanic. Provided, however, that the parties recognize that the Lorain District shall have an opportunity to demonstrate impossibility of achieving the Hispanic goal for reasons unrelated to good faith effort.

4. The HIRING RATE for certificated staff for all subsequent years shall be determined by the District, in light of the pertinent factors (number of vacancies, areas in which staff is needed, availability of qualified applicants, etc.)

5. The hiring rate for non-certificated staff shall be determined by the District, in light of such pertinent factors as are set forth in #4 above.

6. The Lorain District shall have five years during which to achieve the hiring goal as it relates to Blacks and seven years as it relates to Hispanics.

B. *Job Analysis*

A comprehensive review of all employment positions will continue to be conducted during each school year. This review will include job descriptions, job

requirements, selection procedures, and compensation plans. Any identified inequities will be corrected and definitive plans will be made to prevent the recurrence of any such inequities.

C. *Recruitment and Selection of Personnel*

1. All job announcements will specify the nature of the job, the information needed from the applicant and application procedures. Every announcement will include the assurance that the district is an Equal Opportunity Employer.

2. Increased efforts will be made to increase the recruitment of Blacks and Hispanics through the use of non-traditional sources. Some of the recruitment sources that will be used are local news media, local community organizations, schools, newspapers and journals with non-white audiences. In addition, announcements of all promotional type positions will be made available to all personnel presently employed by the district in order to promote opportunities for position upgrading.

3. Recruitment from colleges and universities will include institutions with high percentages of non-white students. Procedures will include sending notices to placement offices, minority affairs offices and non-white student organizations. White, Black and Hispanic recruiting teams will be used.

4. All application forms shall collect only that information directly relevant to job performance.

D. *Promotion and Upgrading Personnel*

1. All individuals responsible for the evaluation, upgrading and promotion of personnel shall complete a yearly report indicating:

a. The promotion records of all employees, especially including all non-whites in each employee classification.

b. The identification of all employees who hold positions that under-utilize their credentials, interests and abilities.

c. The barriers to the upgrading of these employees and recommendations for overcoming these barriers.

Such reports will be collected and reviewed by the administration policy-making groups and, where necessary, appropriate action to correct inequities will be undertaken.

2. Where selection committees are used to recommend candidates for promotion or upgrading, such committees will include Blacks and Hispanics racial minorities, and will be "ad hoc" in nature.

E. *Assignment of Staff*

All staff assignments will continue to be reviewed and assessed on a yearly basis to ensure non-discrimination on the basis of race. No school will be permitted to be identifiable as a school for either non-whites or whites based upon the racial composition of its staff, except upon agreement of the parties or order of the Court.

F. *Collective Bargaining Agreements*

All collective bargaining agreements with employee groups will be examined to ensure that no provisions of the agreement will result in segregation of, or discrimination against, Blacks or Hispanics. If segregative or discriminatory provisions are identified, an attempt shall be made to re-open negotiated agreements to correct any such identified discriminatory provisions without re-opening negotiations of the total

agreement. In addition, arbitration of discrimination grievances shall be in accordance with the provisions of federal and state civil rights requirements.

G. *Layoff, Recall, Discharge and Demotion*

All policies pertaining to layoff, recall, discharge and demotion shall be examined to ensure that no practice creates a disparate effect on racial minorities or women. Seniority and "bumping" provisions will be examined to ensure that they do not perpetuate any past discrimination. Where disparate effect on racial minorities or women is found to exist, appropriate action will be taken to eliminate such disparity.

IV. *School Closing Considerations*

The following criteria for selection of school(s) to be considered for closing will be used:

A. Location in Relation to Neighboring School

1. Preferably, a contiguous attendance area will be maintained.

2. Receiving schools would preferably be adjacent and will adequately house redistricted students.

3. Closing a given school will result in a minimum of redistricting problems.

4. Closing a given school will not result in creating or perpetuating segregation in any receiving school.

5. Closing a given school will not place an inequitable "burden of movement" on either non-white or white students.

B. Adequacy of Facility

1. Educational flexibility (to what extent the school can accomodate changing and varying programs).

2. Age of the building

3. Need for major maintenance or renovation.

C. Enrollment factors present and predicted building and district enrollments.

D. Cost of building operation; utilities costs, etc.

V. *Procedure to Ensure Effective Implementation of District Goals*

An on-going program will be developed by the system to ensure the effectiveness of the goals herein described. All staff will be required to participate in human and race relations training during the first year of the plan to be developed as the result of this document. Schools impacted by large numbers of student transfers will receive first priority for staff training.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed January 5, 1993)

Nos. 91-3666/7

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LORAIN NAACP, *et al.*,
Plaintiff,

v.

LORAIN BOARD OF EDUCATION,
Defendant-Appellee/Cross-Appellant,

LEO SVETE, *et al.*,
Defendant (91-3667),

OHIO DEPARTMENT OF EDUCATION,
Defendant-Appellant/Cross-Appellee,

COALITION FOR HISPANIC
ISSUES AND PROGRESS,
Intervenor-Appellee.

ORDER

BEFORE: RYAN and SUHRHEINRICH, *Circuit Judges*; and CHURCHILL,* *Senior United States District Judge.*

---

* Hon. James P. Churchill sitting by designation from the Eastern District of Michigan.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ LEONARD GREEN
Clerk

Supreme Court, U.S.
FILED
MAY 26 1993
OFFICE OF THE CLERK

NO 92-1713

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LORAIN BOARD OF EDUCATION, et al.,
Petitioners,

v.

OHIO DEPARTMENT OF EDUCATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This school desegregation action was initiated by Complaint filed by Petitioner Lorain NAACP and others in September of 1979. The Defendants were Petitioner Lorain Board of Education ("Lorain Board") and its individual members, the Ohio State Board of Education and its individual members, the Ohio Superintendent of Public Instruction, and Respondent, the Ohio Department of Education ("Ohio Department").

The Complaint was filed after the Lorain Board had closed a single school building, resulting in a disproportionate impact on Black and Hispanic students. Officials at the Ohio Department were of the opinion that the Co-Defendant, the Lorain Board, could be found liable as a result of this action. *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1152 (6th Cir. 1992) (A.20).[1] However, because of the unique circumstances leading up to the Complaint and the fact that the State Board of Education and the Ohio Department were not made aware of these circumstances, officials at the Ohio

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[1] Petitioners misstate the record by relying on the testimony of one of the Ohio Department's witnesses and cite to the District Court, *Lorain NAACP v. Lorain Bd. of Educ.*, 768 F. Supp. 1224, 1238 (1991) (A.56), in support of the proposition that the Ohio Department "was anxious to settle [this litigation] to avoid the heavy costs of litigation and the certainty of an adverse verdict." (Pet. at 19). In fact, the Sixth Circuit found it necessary to address this particular statement of the District Court directly and concluded:

> [A]s a "finding of fact" [this declaration] not only runs counter to the express provision of the consent decree, but appears to improperly delve into the State's motivation for compromise and *misstates the record.*

979 F.2d at 1152 (emphasis added) (A.20).

Department believed that the State's potential liability was not consistent with the previous Ohio school desegregation cases. *Id.*[2]

After extensive discovery and settlement discussions, the parties entered into a Consent Decree filed and approved by the District Court in August of 1984. (A.77-94). No trial was ever conducted, and no liability on the part of any of the Defendants was either admitted or established.

The Consent Decree included a Goal Statement which required the Lorain Board to "[e]liminate racially identifiable schools" and "[a]ssign students to school attendance areas so that each school will establish a composite minority student ratio of no more than a deviation of +20 or -15 percent from the District Average percentage of each identifiable minority's student racial composition." (A.83).

The Goal Statement also included a provision concerning

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[2] In previous school desegregation cases filed in Ohio, the State's liability was premised on the conclusion that State education officials had known about the school districts' intentional discrimination and segregative acts and continued to provide state funding to the districts. *See Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229 (S.D. Ohio 1977), *aff'd*, 583 F.2d 787 (6th Cir. 1978) *aff'd in part and remanded in part*, 443 U.S. 449 (1979), *on remand*, 519 F. Supp. 925 (S.D. Ohio 1981), *aff'd*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *Reed v. Rhodes*, 422 F. Supp. 708 (N.D. Ohio 1976), *remanded without opinion*, 559 F.2d 1220 (6th Cir. 1977), *on remand*, 455 F. Supp. 546 (N.D. Ohio 1978), *supp. opinion*, 455 F. Supp. 569 (N.D. Ohio 1978), *later proceeding*, 581 F.2d 570 (6th Cir. 1978), *aff'd in part*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980), *on remand*, 500 F. Supp. 404 (N.D. Ohio 1980), *aff'd*, 662 F.2d 1219, (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *Brinkman v. Gilligan*, 503 F.2d 684 (6th Cir. 1974), *appeal after remand*, 518 F.2d 853 (6th Cir. 1975), *cert. denied*, 423 U.S. 1000 (1975), *appeal after remand*, 539 F.2d 1084 (6th Cir. 1976), *vacated sub nom. Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977), *on remand*, 561 F.2d 652 (6th Cir. 1977), *on remand*, 446 F. Supp. 1232 (S.D. Ohio 1977), *rev'd*, 583 F.2d 243 (6th Cir. 1978), *aff'd sub nom. Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979), *later proceeding*, 610 F. Supp. 1288 (S.D. Ohio 1985), *remand without opinion*, 835 F.2d 877 (6th Cir. 1987), *remand without opinion*, 835 F.2d 878 (6th Cir. 1987).

bilingual programs aimed at the Lorain City School District's Hispanic students. (A.83). Specifically, the Consent Decree required the Lorain Board to retain an independent contractor to evaluate its existing programs, to eliminate any shortcomings discovered in the evaluation process and implement modifications, and to maintain bilingual programs for Hispanic students. (A.83).

Finally, the Goal Statement required the Lorain Board to achieve a hiring goal for all staff equal to the "minority/ majority ratio of the adult population in Lorain in the year of achievement." (A.88). By 1991, all the goals of the Consent Decree had been achieved except the one pertaining to hiring of minority employees. *Lorain NAACP v. Lorain Bd. of Educ.*, 768 F. Supp. 1224, 1234 (N.D. Ohio 1991) (A.47).

The Consent Decree clearly identified the role each party was to play in implementing desegregation in the Lorain City School District. Contrary to Petitioners' contentions, the Defendants, the Lorain Board and the Ohio Department, did not agree to share equally the costs of desegregating the Lorain City School District. (Pet. at 8-9, 10, 20, 21, 25). In fact, the financial obligation of the Ohio Department was expressly limited to making a specific contribution over seven school years, 1984-85 through 1990-91, that represented the lesser amount of either 50 percent of the cost of desegregation or one million dollars. (A.80).

Petitioners rely on a partial quotation of paragraph 4 of the Consent Decree in order to claim ambiguity regarding the intent of the parties concerning the Ohio Department's funding obligation. (Pet. at 25). However, when the provision is read in its entirety it is abundantly clear no ambiguity exists. The pertinent language on the funding obligation of the parties is as follows:

> 4. The State of Ohio will pay to the Lorain City School District 50 percent of the expenses incurred by the Lorain City School District in designing, implementing, administering and maintaining educationally sound programs reasonably

> expected to reduce racial isolation to the standards defined in the Goal Statement. The State of Ohio will pay 50 percent of the unreimbursed expenses attributed to the transportation of students who are being transported for the reduction of racial isolation. "Unreimbursed expenses" shall mean the portion of this expense which remains after deducting the state transportation reimbursement applicable to students involved in such transportation.
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> The total of the expenses referred to above shall be limited to those incurred during the seven school years 1984-85 through 1990-91, and *the State of Ohio payments shall not exceed $1 million during the seven year term, or 50 percent of the actual reduction of racial isolation costs, whichever is less.*
>
> Beginning in December 1984, payments made by the State shall be made semi-annually in the months of December and June upon the submission of vouchers covering costs actually incurred by the Lorain City School District. Such payments shall be in addition to all other state and federal funds to which the Lorain City School District may be entitled under law and regulations existing at the time of the submission of the vouchers.

(A.80) (emphasis added).

With regard to the bilingual program, the Ohio Department's obligation was specified as follows:

> The cost of such evaluation shall be considered part of the cost of implementation of the Consent Decree and *up to 50 percent of the cost shall be reimbursed by the State of Ohio as provided in Item No. 4 of the Consent Decree.*

(A.83) (emphasis added). Thus, the funding to be provided by the Ohio Department was firmly in place and fixed to a maximum of one million dollars, with the only reimbursable cost associated with the bilingual program being the independent evaluation.

No attempt was made, by either the Lorain Board or the Ohio Department, to calculate the costs of implementing the desegregation plan at the time the funding provisions of the Consent Decree were negotiated. Indeed, at the time the Ohio Department agreed to pay fifty percent of the Lorain Board's costs up to one million dollars, the Lorain Board had not even decided on the method it was going to utilize to desegregate its school district. That decision was not made until the parties were unable to agree on a plan to be utilized to achieve the objectives of the Consent Decree, and the District Court directed the Lorain Board to present a revised proposed plan for implementation.

The Proposed Plan, with some modifications, was adopted by Memorandum Opinion and Order issued April 1, 1985. The Proposed Plan identified six schools that were out of compliance with the student racial composition requirement of the Consent Decree, and identified 654 as the number of students that needed to be moved to achieve the requisite racial composition. Under the Proposed Plan, the Lorain Board chose to use magnet schools as the method for moving students and achieving the racial composition goals.

On January 29, 1990, the Lorain Board filed a Motion for an Order Requiring the Defendant State Board of Education to Increase its Share of the Costs of Implementing and Completing the Desegregation Plan. ("Lorain Board's Motion"). Neither the Lorain NAACP nor the Coalition for Hispanic Issues and Progress ("CHIP"), which was granted leave to intervene in the action in April of 1989 to represent the interests of the Hispanic students and community in the Lorain City School District, joined in the motion.

On May 24, 1990, the District Court issued an Order denying the Lorain Board's Motion, finding that:

> The language of the Consent Decree clearly limits the State's financial exposure to the cost of the desegregation plan incurred during the seven school years 1984-85 through 1990-91 to $1 million dollars or 50 percent of the actual cost, whichever is less. There is no provision in the Consent Decree for increased contribution on the part of the State should the cost of the desegregation plan exceed the original estimate.

The District Court went on to apply the standard set forth in *Heath v. DeCourcy,* 888 F.2d. 1105 (6th Cir. 1989) (*"Heath I"*), *following remand,* No.91-3778/92-3317, 1993 U.S. App. LEXIS 9933, (6th Cir. April 30, 1993) (*"Heath II"*), for modifying a consent decree and found:

> The goal of the Consent Decree at issue in this case is to desegregate the Lorain school system pursuant to the terms set out in the Consent Decree and to maintain an effective bilingual program. While the greater than anticipated cost of the program may constitute a changed circumstance, it does not go to the heart of the purpose of the Consent Decree.

The Lorain Board filed a Motion for Reconsideration of the District Court's May 24, 1990, Order. The Ohio Department opposed the motion for reconsideration, and on July 26, 1990, the District Court conducted a hearing. After the hearing and submission of post-hearing briefs, the District Court on August 17, 1990, directed the Lorain Board and the Ohio Department to enter into discussions for the purpose of renegotiating the Consent Decree. The Co-Defendants were further directed, if unable to reach agreement, to submit their own respective proposals to the District Court. Following clarification from the District Court that this was not a final appealable Order, the Ohio Department entered into negotiations with the Lorain Board. After no resolution was

reached, the Ohio Department and the Lorain Board submitted separate proposals to the Court in early 1991.[3]

A hearing on the Lorain Board's Motion was held in April and May of 1991. Evidence presented at the hearing showed that since 1985 the Lorain Board had increased the scope of its magnet program and the number of students involved. The District Court concluded that it was necessary for the Lorain Board to move more than 650 students to maintain a viable desegregation program, despite the Lorain City School District's stable population, both in percentage of racial composition and geographic location. 768 F. Supp. at 1231 (A.40). In addition, by the spring of 1991, in addition to the approximately 1300-1350 students in "court ordered" magnet programs, there were an additional 2000-2200 students in "non-court ordered magnet programs."[4] As the District Court correctly noted:

> 7. Lorain has expanded its magnet school program beyond the magnet programs *necessary* to achieve the goals of the Consent Decree in the above-captioned case. Seventeen out of twenty-one schools in Lorain currently have magnet programs. . . . The additional magnet programs in place in the Lorain City School District help Lorain to maintain desegregation in its school district but are not necessary for Lorain to maintain compliance with the terms of the Consent Decree with respect to composition of student population.

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[3] Petitioners incorrectly contend that the record shows that the Ohio Department failed to negotiate. (Pet. at 10-11, 20). What the record reveals is simply that the negotiations were unsuccessful.

[4] "There are approximately 3,500 students involved in magnet programs in Lorain out of a total student population in the District of about 12,300 students." 768 F. Supp. at 1232. (A.41). This is in dramatic contrast to the 654 students initially identified in the Proposed Plan as the number needed to be moved to achieve the requisite racial composition. *See supra* at 5.

768 F. Supp. at 1231-1232 (A.41), (footnote and transcript citations omitted) (emphasis in original).

On June 21, 1991, the District Court issued a Memorandum Opinion and Judgment Entry ordering the Ohio Department to pay fifty percent of the Lorain Board's claimed desegregation costs for the 1989-90 school year, for a total of $2,600,917.00. 768 F. Supp. at 1244, 1245 (A.73). The District Court further ordered the Ohio Department to pay forty percent of the desegregation costs for the 1990-91 school year; thirty percent for the 1991-92 school year; twenty percent for the 1992-93 school year; and ten percent for the 1993-94 school year. 768 F. Supp. at 1246 (A.74).

The District Court estimated that the payments over the five years would total approximately nine million dollars. 768 F. Supp. at 1246 n.30 (A.74). The District Court provided the Lorain Board with leave to file an application for reimbursement for each of the remaining four school years and provided the Ohio Department thirty days to file objections challenging the accountings in the applications. 768 F. Supp. at 1246 (A.75). The District Court also ordered the Ohio Department to pay interest, at the rate prescribed by law, from the date of the Judgment Entry, unless the Ohio Department paid the principal amount of the initial judgment, $2,600,917.00 within sixty days. *Id.*

The Ohio Department appealed to the Sixth Circuit, asserting that the District Court had erred as a matter of law by imposing additional financial obligations on the Ohio Department under the guise of modifying the Consent Decree.[5] Petitioner Lorain NAACP was not a party to the appeal because it had not followed the Sixth Circuit's rules for notice of appearance of counsel and had not timely filed a brief.

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[5] The Ohio Department also assigned as error several issues including the payment of interest and matters relating to the District Court's calculation of the additional financial obligation. These factual assignments of error were not ruled upon by the Sixth Circuit. *Lorain NAACP*, 979 F.2d at 1153 n. 5 (A.23).

In an Opinion issued November 12, 1992, the Sixth Circuit Court of Appeals reversed the District Court, holding that:

> . . . a district court may not, in the name of modification, circumvent the express terms of a defendant party's consent in the absence of an adjudicated or admitted violation of law. In the absence of an adjudication or admission of constitutional violation, the district court's authority to impose additional obligations on a defendant is constrained by the terms of agreement entered by the parties to the consent decree.

Lorain NAACP, 979 F.2d at 1153 (A.22). A motion for rehearing and suggestion for rehearing *en banc* was denied by the Sixth Circuit on January 5, 1993. (A.93).

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT WARRANT EXERCISE OF THIS COURT'S JURISDICTION WHERE THE LOWER COURT'S DECISION IS SUPPORTED BY SOUND PRINCIPLES OF PUBLIC POLICY AND PRESENTS NO CONFLICT WITH CASE LAW OF THIS COURT OR OTHER CIRCUIT COURTS

A. The Sixth Circuit's Decision Limiting A District Court's Ability To Expand A Consent Decree To Increase The Obligation Of A Party Where No Liability Has Been Admitted Or Adjudicated Is Supported By Sound Principles Of Public Policy

Petitioners attempt to disguise the Lorain Board's effort to fundamentally change the Consent Decree as merely a request to enforce or modify the Consent Decree when, in fact, what the Lorain Board asked the District Court to do was to vastly expand the obligations of the Ohio Department. Both Lower Courts acknowledged that the Consent Decree,

as expressly written, did not provide for any state funding beyond one million dollars. 768 F. Supp at 1243-1244 n. 24 (A.68-69); 979 F.2d at 1147 (A.9).

Petitioners incorrectly allege that the Sixth Circuit, in refusing to permit a modification which would have increased the Ohio Department's obligation from one million to nine million dollars, promulgated a new rule of law, without precedent which would eliminate a district court's power to modify a consent decree. (Pet. at 3). The Ohio Department has never contested the District Court's authority to adopt, enforce, or interpret a consent decree or modify it by reducing a party's obligations. As noted by the Sixth Circuit:

> [t]he state's appeal in this case did not challenge the district court's authority to modify a consent decree generally nor question the proper standard for modification; it is concerned instead with the court's authority to modify the decree by substantially increasing the State's burden, over its objection and without any finding or acknowledgment that the State has violated the Plaintiff's constitutional rights.

979 F.2d at 1150 (A.15).

In addressing this issue the Sixth Circuit held:

> [A] district court may not, in the name of modification, circumvent the express terms of a defendant party's consent in the absence of an adjudicated or admitted violation of law. In the absence of an adjudication or admission of constitutional violation, the district court's authority to impose additional obligations on a defendant is constrained by the terms of agreement entered by the parties to the consent decree.

979 F.2d at 1153 (A.22). The decision of the Sixth Circuit prevents radically different obligations from being imposed on a governmental defendant, which entered into and has

fully complied with a consent decree, but which never had an opportunity to defend itself on the issue of liability and was never found liable for any constitutional violation. This holding is a reasonable method of balancing the interests of the parties to institutional reform litigation. To hold otherwise would mean that a governmental agency could be required to take action, including the expenditure of public money, far in excess of what it had originally agreed to settle the litigation.

Contrary to Petitioners' assertion, it is this unlimited potential for increased obligations on a defendant, not the unavailability of such increases at the request of plaintiffs or co-defendants, which would have a chilling effect on parties' willingness to enter into consent decrees. Unless a party can be certain that the terms of its compromise will not be altered in a manner which increases its obligations, it cannot reasonably be expected to give up its right to establish its lack of liability at trial.[6]

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[6] Petitioners make several inaccurate statements about the significance of the use of a liability disclaimer provision in the Consent Decree. First, Petitioners state that the Sixth Circuit viewed the disclaimer as pivotal to its decision. (Pet. at 17). However, what the Sixth Circuit viewed as pivotal was that the Ohio Department had not admitted or been adjudicated liable of a constitutional violation. The disclaimer illustrates this but was not the basis for the Sixth Circuit's reversal of the District Court.

Petitioners then assert that a disclaimer is to be given very little weight, citing *Stuart v. Roche*, 951 F.2d 446 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1948 (1992), and *Donaghy v. City of Omaha*, 933 F.2d 1448 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 938 (1992) in support of this conclusion. (Pet. at 17-18). These cases do not support Petitioners' argument, however, as they are both factually and legally distinct. Both *Stuart* and *Donaghy* deal with third party reverse discrimination challenges to consent decrees. Both cases hold that the liability disclaimer does not mean that the consent decree cannot be considered remedial for purposes of withstanding third party challenges of reverse discrimination. Neither case stands for the proposition that all disclaimers are to be considered surplusage.

This is especially significant for governmental defendants which have ongoing obligations to carry out their activities in a constitutional manner and which also serve as stewards of the public's money. Ironically, the direct beneficiary of the sought after increased funding from the Ohio Department in this case is the Lorain Board, another governmental agency and a Co-Defendant in this litigation.

Contrary to Petitioners' suggestion, prior court decisions interpreting modifications of consent decrees in institutional reform litigation do not indicate that parties have been deterred from entering into consent decrees with governmental agencies or that more cases have not been settled and have gone to trial as a result of a court's inability to increase a governmental defendant's liability in the absence of an admission or an adjudication of a constitutional violation. Nor do Petitioners provide this Court with any rationale for their belief that the Sixth Circuit's decision will cause a chilling effect on parties' willingness to enter into consent decrees.

In fact, the Sixth Circuit's decision is consistent with the holdings of the other circuit courts of appeals that have considered this same issue. *See Walker v. U.S. Dept. of Hous. and Urban Dev.*, 912 F.2d 819 (5th Cir. 1990); *Rajender v. University of Minnesota*, 730 F.2d 1110 (8th Cir. 1984); *Fox v. Dept. of Hous. and Urban Dev.*, 680 F.2d 315 (3rd Cir. 1982); *see also San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 896 F.2d 412, 415 (9th Cir. 1990). *See infra* at 15 - 19. No evidence has been presented from the experiences of these circuits that would validate Petitioner's claims of chilling effect. Moreover, the result urged by Petitioners could easily result in an increase in complex institutional reform cases that governmental entities would be compelled to adjudicate through lengthy, hard fought trials.

B. The Sixth Circuit's Holding That A District Court May Not Modify A Consent Decree To Substantially Increase A State's Burden Over Its Objections And Without Any Finding Or Admission That A State Violated Plaintiff's Constitutional Rights, Is Consistent With The Well-Settled Law Established By This Court.

The Sixth Circuit's decision in the present case is consistent with this Court's longstanding principle that federal judicial power "may be exercised 'only on the basis of a constitutional violation . . . . ' " *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)). The principle that federal judicial power must be tailored to remedying a constitutional violation has been restated in this Court's more recent decisions. *Freeman v. Pitts*, 112 S. Ct. 1430, 1445 (1992); *Board of Educ. of Oklahoma City Public Schools v. Dowell*, 111 S. Ct. 631, 637 (1991).

Similarly, in *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 762 (1992), this Court stated that "[f]ederal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated." Petitioners argue that the Sixth Circuit's decision eviscerates the flexible standard established by this Court in *Rufo* for modification of consent decrees and that this decision is a departure that will erode the flexibility needed to ensure dismantling of segregated institutions. (Pet. at 5, 7). The Sixth Circuit, examining the basic principles of consent decree interpretation and modification, clearly held that the less stringent standard enunciated in *Rufo* and *Heath I*, 888 F.2d 1105 (6th Cir. 1989) would apply to school desegregation cases. *Lorain NAACP*, 979 F.2d at 1149. (A.14). The recent Sixth Circuit decision of *Heath II*, clearly indicates that the Circuit understood and correctly applied *Rufo*. *Heath II*, No. 91-3778/92-3317, 1993 U.S. App. LEXIS 9933 at *13.

The Sixth Circuit decision in the case at bar is not a departure from the *Rufo* standard governing modifications. *Lorain NAACP,* 979 F.2d at 1148-49 (A.12-15). Rather, the Sixth Circuit determined that *Rufo* had not addressed the situation in which the modification sought to *increase* the obligations of a party. 979 F.2d at 1152-53, n.4 (A.20-22).[7] Therefore, the Sixth Circuit's holding is limited to cases seeking to impose an additional obligation on a party in the absence of an adjudication or an admission of a constitutional violation. This decision is consistent with the other courts of appeals which have addressed this issue and is not in contravention of this Court's decision in *Rufo.*

Moreover, the Sixth Circuit's decision is consistent with the decisions of this Court which have repeatedly reiterated the need for district courts to limit their involvement in school desegregation cases as the school district becomes unitary. *Dowell,* 111 S. Ct. at 637. This Court, in *Dowell,* cited the "all deliberate speed" language from *Brown v. Board of Educ.,* 349 U.S. 294, 301 (1955), and noted that "[f]rom the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination." 111 S. Ct. at 637. Thus, remedial orders in school desegregation cases "are not intended to operate in perpetuity." *Id.* Significantly, this statement was made in the context of a request by the Oklahoma City Board of Education to dissolve the desegregation consent decree.

The Sixth Circuit's decision in the present case prohibits a modification which would have increased the Ohio Department's financial obligation more than nine-fold, from one million to over nine million dollars, and which would have extended the Ohio Department's financial obligation for an additional five years. This increase and extension were ordered by the District Court at a time when all school

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[7] Even Petitioner admits that in the context of modification of a consent decree, this Court has never addressed a district court's ability to impose additional financial obligations on a governmental defendant. (Pet. at 14).

buildings in the Lorain City School District had been in compliance with the Consent Decree since the 1989-1990 school year and the Lorain Board had met all of its obligations under the Consent Decree except for the minority hiring goals.[6] Under these circumstances, the Sixth Circuit's reversal of the District Court's modification order furthers the important goal of removing the Lorain City School District from continuing federal court supervision, a supervision which has imposed obligations on the Lorain Board and the Ohio Department since 1984.

C. The Sixth Circuit's Decision Is Consistent With The Other Circuits Which Have Addressed The Issue Of Attempted Expansion Of A Party's Obligations Under A Consent Decree.

As pointed out by the Sixth Circuit in its Opinion, it could find no authority, and none was provided by Petitioner:

> . . . to support the contention that, absent an adjudication of constitutional violation, the State of Ohio is legally obliged, or may be judicially ordered over its objection, to increase its share of the costs of desegregation beyond the $1 million limitation establishing the terms and scope of its consent.

979 F.2d at 1153 (A.22). However, other circuit courts of appeals have addressed requests similar to the issue in this case, that is, the attempted expansion of a party's financial obligation under a consent decree. In each case the court of appeals reversed the district court's order expanding the consent decree.

In *Fox v. United States Dept. of Hous. and Urban Dev.*,

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[6] The money ordered to be paid by Ohio Department was reimbursement for the Lorain Board's expenses in operating its magnet programs and its bilingual program and, except for several hundred dollars, had nothing to do with minority hiring.

680 F.2d 315 (3rd Cir. 1982), the Third Circuit Court of Appeals considered an order by the district court modifying a consent decree by requiring defendant United States Department of Housing and Urban Development ("HUD") to allocate eleven million dollars to finance the rehabilitation and construction of lower income housing. HUD, like the Ohio Department, had never been found liable by either the consent decree or by a prior adjudication on the merits. The Court recognized that "[t]he plaintiffs have not sought enforcement of an existing term, but imposition of an additional term beyond the scope of HUD's consent." 680 F.2d at 322. In vacating the district court's modification order, the court reasoned that:

> Although we do not doubt the power of a court to modify an injunctive order entered by consent, we think that in the usual case *a court may not impose additional duties upon a defendant party to a consent decree without an adjudication or admission that the defendant violated the plaintiffs' legal rights* reflected in the consent decree and that modification is essential tc remedy the violation. . . . To impose additional duties under the decree because of those changes is to disregard the basic rights of litigants who waive their right to litigate defenses by consenting to have a decree entered against him. The conditions upon which rights are waived must be respected.

680 F.2d at 323 (emphasis added).

In *Rajender v. University of Minnesota*, 730 F.2d 1110 (8th Cir. 1984), the Eighth Circuit addressed an attempt to expand a party's liability beyond the consent decree. *Rajender* involved an employment discrimination suit brought by non-student employees against the University. Prior to the conclusion of the trial on the merits, the parties entered into a consent decree which among other things, set a $6,000. limit on attorney fees. Nine months later, the district court changed the decree, over the objections of the University, and expanded the University's liability to include "all

reasonable" attorney's fees without a limitation on the dollar amount. 730 F.2d at 1114. The Eighth Circuit reversed, stating that "[w]e cannot save the parties from a bad bargain, or from a bargain that they now claim was bad." 730 F.2d at 1117.

Most recently, *Walker v. United States Dept. of Hous. and Urban Dev.*, 912 F.2d 819 (5th Cir. 1990), the Fifth Circuit Court of Appeals was presented with the issue of whether it should expand a consent decree and impose upon HUD an additional financial obligation. As in the case at bar, the co-defendant to the consent decree, the Dallas Housing Authority, claimed that it could not continue the plan to address racial housing segregation in Dallas under the consent decree because another governmental entity and co-defendant, HUD, had drastically reduced its federal operating subsidy. The issue before the court was whether the decree should be expanded to require HUD to increase the subsidy.

The Fifth Circuit refused to impose this type of expanded liability and held:

> As a general principle, a consent decree is a product of negotiation and compromise entered into by parties with divergent purposes, but aligned for the simple reason of avoiding costly and protracted litigation. *See United States v. Armour & Co.*, 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757-58, 29 L.Ed.2d 256 (1971). The respective obligations of these parties are discerned strictly from within the decree's four corners, as written, and not from the articulated purposes of either party. *Id.* at 682, 91 S.Ct. at 1757.
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> Nor are courts at liberty to redraft the obligations commanded by the decree absent consent of the parties.

912 F.2d at 825. The Fifth Circuit concluded that it was "not at liberty to modify the decree to bind HUD involuntarily

to additional financial obligations to which, as the court admits, the agency never agreed." The Fifth Circuit, relying on the Third Circuit, stated:

> As was the case in *Fox*, the parties "have not sought enforcement of an existing term, but imposition of an additional term beyond the scope of HUD's consent." Id. at 322. If the decree has been frustrated because the parties' respective fiscal obligations were not memorialized in writing, the decree should be vacated, renegotiated and, if impasse persists, the cause scheduled for trial.

912 F.2d at 827.

In each of these Circuits, the Courts of Appeals expressly held that a district court cannot expand a consent decree by imposing additional duties on one of the parties to a consent decree without an admission or adjudication that the party violated the plaintiffs' legal rights.[9] Moreover, Petitioners rely on *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 896 F.2d 412 (9th Cir. 1990) to support their contention that a district court had authority to impose additional financial obligations on a government defendant when substantially changed circumstances warrant the modification. (Pet. at 12). *San Francisco NAACP* involved a challenge by a local school district to the state's reduction in funding for desegregation which had been established pursuant to a consent decree. The Ninth Circuit declined to expand the scope of the consent decree given its language

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[9] Petitioners state that *Fox*, 680 F.2d 315, and *Walker*, 912 F.2d 819, applied the *U.S. v. Swift & Co.*, 286 U.S. 106 (1932), strict standard of review, which is no longer in force. (Pet. at 17 n.2). Petitioners are incorrect because both *Fox* and *Walker* distinguish *Swift* and limit it to cases in which a defendant was seeking to be released from obligations imposed by a consent decree. *Fox* and *Walker* both involved the imposition of new burdens on a defendant and are concerned with the court's authority, not the standard of review to be used. *Fox*, 680 F.2d at 323; *Walker*, 912 F.2d at 827. The relaxation of the strict *Swift* standard of review did not affect the validity of either of these cases.

and the lack of extrinsic evidence as to the intent of the parties. 896 F.2d at 415. Similar to the other circuits considering this issue, the Ninth Circuit "note[d] courts have generally been reluctant to impose affirmative funding obligations on governments where those obligations exceed the express terms of a consent decree." *Id.* (*citations omitted*).

Accordingly, the Sixth Circuit's holding in this case that a district court cannot modify a consent decree to impose new and substantially burdensome obligations on a party without that party's consent, in the absence of an admission or adjudication of constitutional liability by that party breaks no new ground. It is entirely consistent with the holdings of the other circuits which have addressed this issue.

II. THE SIXTH CIRCUIT APPLIED THE CORRECT STANDARD OF APPELLATE REVIEW AND NO INSTRUCTION IS NEEDED FOR THE LOWER COURTS

Petitioners' second suggested reason for granting certiorari is that it would provide this Court an opportunity to instruct the district and appellate courts on the proper standards for appellate review. This opportunity is not needed because it is Petitioners, rather than the Sixth Circuit, which misunderstand the role of the appellate court in reviewing decisions of the district court.

The Sixth Circuit held that in circumventing the express terms of the Consent Decree, the District Court abused its discretion. Petitioners argue that the Sixth Circuit erred in using this standard of review. (Pet. at 23). Petitioners are wrong on this point, since abuse of discretion is the appropriate standard of appellate review and the Sixth Circuit applied it correctly in this case.

A consent decree is a form of injunctive relief, and an appellate court's power of review is derived from 28 U.S.C. 1291(a)(1). *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 757 (1986), *overruled on other grounds, Planned Parenthood of Southeastern Penn.*

v. Casey, 112 S. Ct. 2791 (1992). A court of appeals reviews a district court's decision concerning a consent decree only to see if the district court abused its discretion. *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417-18 (1977); Fed. R. Civ. P. 52. Abuse of discretion may be shown by demonstrating that the district court relied on clearly erroneous findings of fact, or improperly applied the law or relied on an erroneous legal standard. *Id. See also Black Law Enforcement Officers Ass'n v. Akron*, 824 F.2d 475 (6th Cir. 1987).

In the present case, the Sixth Circuit clearly stated that it reviewed the District Court's decision on an abuse of discretion standard. *Lorain NAACP*, 979 F.2d at 1153 (A.23). The Sixth Circuit found that the District Court had improperly applied the law and overstepped its authority by imposing additional obligations on the Ohio Department in the absence of an admission or adjudication of a constitutional violation. 979 F.2d at 1153 (A.23). This legal error constituted an abuse of discretion. *Dayton Bd. of Educ.*, 433 U.S. at 417-18.

Because the Sixth Circuit held that the District Court applied the wrong legal standard and therefore abused its discretion, the Sixth Circuit did not have to review the District Court's factual findings. While the Sixth Circuit indicated that it agreed with many of the District Court's findings, such as the finding that the Consent Decree clearly limited the Ohio Department's obligation to one million dollars, the Sixth Circuit explicitly refrained from addressing many of the factual issues because its legal analysis justified finding an abuse of discretion on the part of the District Court. The Sixth Circuit based its conclusion, that the District Court had abused its discretion, on a finding that the District Court had applied the wrong legal standard and not on any review of the District Court's factual findings.

Thus, the Sixth Circuit identified and correctly applied the right standard of review. There is no need for this Court to grant this Petition to instruct the appellate courts on this issue.

CONCLUSION

For all the aforementioned reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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